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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2060

CARL M. AUSTIN, *et al.*, *Appellants*,

v.

STATE OF NEW HAMPSHIRE, *et al.*, *Appellees*,

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW HAMPSHIRE

FILED JULY 22, 1974
PROBABLE JURISDICTION NOTED OCTOBER 15, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2060

CARL M. AUSTIN, *et al.*, *Appellants*,

v.

STATE OF NEW HAMPSHIRE, *et al.*, *Appellees*,

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Opinion of the Supreme Court of the State of New Hampshire reported in 316 A.2d 165 as *Carl M. Austin, et al. v. State Tax Commission*, Merrimack No. 6641 is included in Appendix B of Appellants' Jurisdictional Statement at pp. A4-A9.	
Judgment of the Supreme Court of the State of New Hampshire is included in Appendix B of Appellants' Jurisdictional Statement at p. A9.	

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

State of New Hampshire — Superior Court
For Merrimack County
Docket Entries

December 6, 1971	—	Petition (for Declaratory Judgment) & Order returnable first Tuesday of January 1972.
December 23, 1971	—	Return of service.
December 24, 1971	—	Defendants' Motion to Dismiss.
December 27, 1971	—	Plaintiff objects to Defendant's Motion to Dismiss and wish to be heard.
April 6, 1972	—	Motion to Dismiss is denied subject to exception. Bill of Exceptions or proposed Reserved Case to be filed by June 1, 1972.
September 19, 1972	—	Proposed Reserved Case.
September 20, 1972	—	Reserved case allowed for transfer.
March 29, 1973	—	Entered in Supreme Court.
February 28, 1974	—	Rescript from the Supreme Court: "Declaratory judgment for the defendant."

Supreme Court of the State

of New Hampshire

Docket Entries

March 29, 1973	— Merrimack 6641: Entered Transfers, without ruling, question whether the payment of commuters income tax (RSA ch. 77-B) by nonresidents employed in New Hampshire violates the State and United States Constitutions.
May 14, 1973	— Plaintiffs' brief filed.
September 4, 1973	— Defendant's brief filed.
September 6, 1973	— Oral arguments in this case were heard.
February 28, 1974	— Declaratory judgment for defendant.
May 13, 1974	— Plaintiffs filed Notice of Appeal to Supreme Court of United States.

PETITION FOR DECLARATORY JUDGMENT

FILED DECEMBER 6, 1971

Now come Carl M. Austin of 52 School Street, Berwick in the County of York, and State of Maine, Arthur W. Peverly of 85 Eliot Road, Kittery in the

County of York and State of Maine, and Richard W. Logan of Brixham Road, York in the County of York and State of Maine, and complain against the State of New Hampshire, Lawton Chandler, William Conway and William Maynard, all of Concord in the County of Merrimack and State of New Hampshire, individually and in their capacity as Commissioners of the New Hampshire Tax Commission, and Lawrence Blake of Concord in the County of Merrimack and State of New Hampshire, individually and in his capacity as Director of the Business Profits Division of the New Hampshire Tax Commission, and say:

1. That said petition is brought by Petitioners individually and on behalf of any citizen of the State of Maine similarly situated who desires to join in said petition.

2. That the Legislature of the State of New Hampshire enacted into law R.S.A. 77-B entitled Commuters Income Tax, said act becoming effective on July 1, 1970.

3. That Section 77-B:22 II. provides as follows: "On Nonresidents, Income Earned in New Hampshire. A tax is hereby imposed upon every taxable nonresident, which shall be levied, collected and paid annually at the rate of four percent of their New Hampshire derived income as defined in RSA 77-B:1 less an exemption of two thousand dollars; provided, however, that if the tax hereby imposed exceeds the tax which would be imposed upon such income by the state of residence of the taxpayer, if such income were earned in such state, the tax hereby imposed shall be reduced to equal the tax which would be imposed by such other state."

4. That in 1970, the Petitioners, Carl M. Austin, Arthur W. Peverly and Richard W. Logan, were employed in occupations or businesses in which they derived income while working in the State of New Hampshire and are presently so engaged.

5. That as a result of said employment said Petitioners paid through withholding and by direct payment, taxes to the State of New Hampshire Business Profits Tax Division, collected under the terms of said act and are still having to pay said tax.

6. That said Petitioners are informed and believe and therefore allege that said act is arbitrary, discriminatory and retaliatory against them and against other citizens of the State of Maine similarly situated and a violation of their rights under the constitution of the United States of America and the constitution of the State of New Hampshire.

7. That a justiciable controversy exists between the Petitioners and the Petitionees.

WHEREFORE, said Petitioners pray: that they be granted a hearing on this petition; that after said hearing a judgment declaratory be entered declaring Section 2 II. of RSA 77-B null and void as a violation of the rights of said Petitioners under the constitution of the United States of America and the constitution of the State of New Hampshire; that said Petitionees be ordered to refund to the Petitioners all sums collected together with interest; that they be granted their costs and reasonable attorneys fees; that upon final determination Petitionees be restrained and enjoined from levying, assessing or collecting any further taxes under said Section; and for such other and further relief as may be just.

Carl M. Austin,
Arthur W. Peverly and
Richard W. Logan

By their attorneys
Flynn, Powell & McGuirk

By: *Thomas E. Flynn*
Smith, Elliott & Wood
Saco, Maine

By: *Charles W. Smith*

RESERVED CASE

ALLOWED FOR TRANSFER

SEPTEMBER 20, 1972

This is a petition for declaratory judgment wherein the petitioners allege that the commuters income tax, RSA 77-B, to be in violation of the rights of the petitioners under the Constitution of the United States of America and the Constitution of the State of New Hampshire; and seek injunctive and other relief.

The defendant moved to dismiss, which motion was denied and defendant has seasonably excepted. It is agreed that the plaintiffs are residents in the State of Maine, employed in the State of New Hampshire, and have paid the tax assessed by RSA 77-B in accordance with their tax returns copies of which are exhibits and are transferred with the record in accordance with the list of exhibits included herein.

All question of law raised by the within petition and the action of the Court on the motion to dismiss are reserved and transferred without ruling.

The pleadings, including all motions with the Court's action thereon and with a list of the exhibits transferred, are to be printed as an appendix.

Reserved and transferred.

Charles J. Flynn

Charles J. Flynn

September 20, 1972

EXHIBIT 1

TOTAL $

SIGNATURE

DATE 2/17/71

REFUND NUMBER

BUSINESS PROFITS TAX DIVISION

173

P.O. Box 637
Concord, N. H. 03301

Commuters
Remittance

For Calendar Year 1970 or other taxable year beginning .19 and ending .19 1970

Income Tax Return

(First name and initial (joint return, use first names and middle initials of both)	Last name	Your Social Security Number
Carl L. & Jeannine R.	Austin	001-16-4372
Name address (Number and street or rural route)		Spouse's Social Security Number
43 School Street		003-22-7329
City, town or post office, and State	Zip Code	
Berwick, Me	03901	

A. If married, are you filing a joint Federal Return? ☒ Yes ☐ No

B. Is your spouse filing a separate New Hampshire Return? ☐ Yes ☒ No
If "Yes," enter name of spouse.

1.	New Hampshire derived income		5134.05
2.	Less Exemption $2,000.00 (Husband and wife filing jointly — see instructions)		2000.00
3.	New Hampshire Taxable income (line 1 less line 2)		3134.05
4.	New Hampshire Commuters Income Tax (line 3 multiplied by 4%)		125.39
5.	Tax credit allowable by resident state on N. H. derived income	15.17	
6.	Enter here amount on line 4 or 5, whichever is LESSER		15.17
7.	CREDITS A N.H. Commuters income tax withheld (attach W-2)	33.28	
	B 1970 Estimated Commuters tax paid	--	33.28
8.	If line 6 is GREATER than line 7 enter BALANCE DUE here (Payable in full at time of filing this return)		
9.	If line 7 is GREATER than line 6 enter OVERPAYMENT here		18.11
10.	Apply OVERPAYMENT TO 1971 estimate	or REFUND 18.11	

Under penalty of perjury, I declare that I examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct and complete. If prepared by a person other than taxpayer, his declaration is based on all information of which he has any knowledge.

Sign here: Carl L. Austin 2/17/71 Jeannine R. Austin 2/17/71
(Husband's signature and date) (If joint return both husband and wife must sign) (Wife's signature and date)

Sign here: Robert Houle 43 School Street, Berwick, Maine 2/17/71
(Signature of preparer other than taxpayer) (address) (date)

THIS RETURN MUST BE ACCOMPANIED BY A LEGIBLE COPY OF THE RESIDENT STATE INCOME TAX RETURN FOR THE SAME TAXABLE PERIOD.

Please file this return, together with check made payable to

STATE OF NEW HAMPSHIRE

DIRECTOR
BUSINESS PROFITS TAX DIV.
P.O. BOX 637
CONCORD, NEW HAMPSHIRE 03301

EXHIBIT 1 (cont'd)

GENERAL ELECTRIC COMPANY
100 MAIN STREET
DOVER-FOXCROFT, N.H. 03578
14-0659340

WAGE AND TAX STATEMENT 1978

Copy B—To be filed with employee's tax return
← Type or print EMPLOYEE'S identification number, name and address

FEDERAL INCOME TAX WITHHELD	WAGES PAID SUBJECT TO WITHHOLDING IN 1978	OTHER COMPENSATION PAID IN 1978	F.I.C.A. EMPLOYEE TAX WITHHELD	TOTAL F.I.C.A. WAGES PAID IN 1978	STATUS	CASES WHERE FILING DATE IS DIFFERENT FROM FEDERAL
1107 94	9029 99		374 40	7800 00	2	NH 9134 00

Type or print EMPLOYEE'S social security number → 001 16 4372

SUE 0194
AUSTIN CARL M
32 SCHOOL ST
BERWICK ME

NAME OF STATE	STATE FORM NO.	STATE TAX WITHHELD
MAINE		20 00
NEW HAMPSHIRE		33 20

NAME OF CITY | CITY FORM NO. | CITY TAX WITHHELD

EXCLUDABLE SICK PAY

*UNCOLLECTED EMPLOYEE TAX ON TIPS

Include tips reported to employer. Amount in boxes should accompany W-2 as you received it.

Total this year's wages, or figures the amount to be reported as wages and withheld on your income tax return.

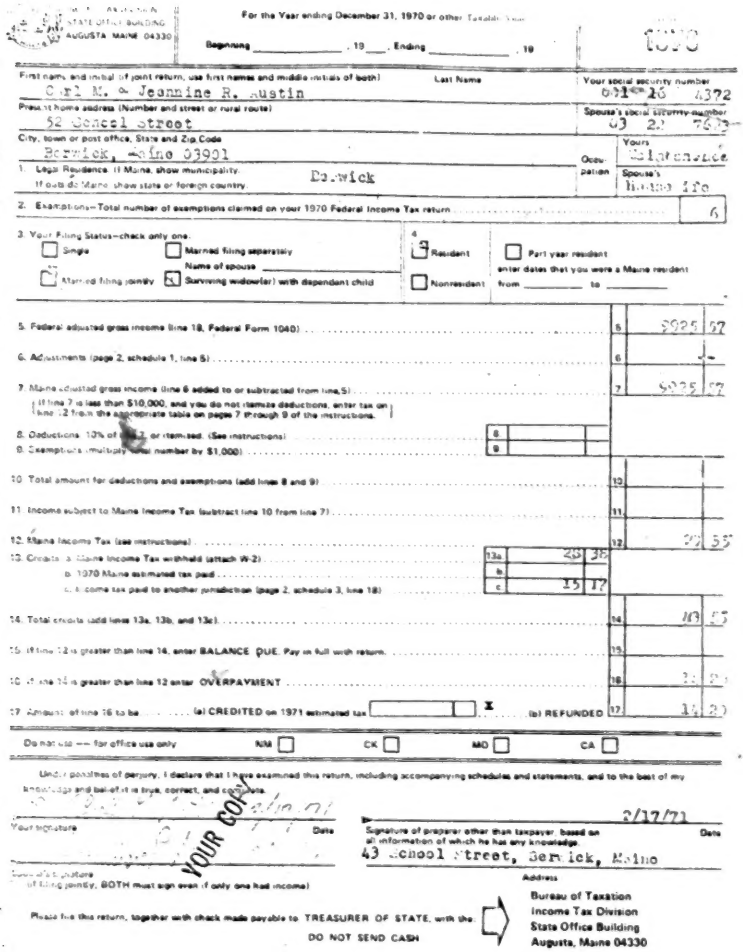
Some right of the employer was withdrawn to require the use of integrate insurance benefits. The termination of his age, service, and disability allowance.

Include in reports to employee

Type or print EMPLOYEE'S name and address, including ZIP code above

POOR COPY

EXHIBIT 1 (cont'd)



STATE OF MAINE
STATE OFFICE BUILDING
AUGUSTA, MAINE 04330

For the Year ending December 31, 1970 or other Taxable Year
Beginning _____, 19___, Ending _____, 19___

1040

First name and initial (if joint return, use first names and middle initials of both) — Last Name
Carl M. & Jeannine R. Austin

Your social security number
021-26-4372

Present home address (Number and street or rural route)
52 School Street

Spouse's social security number
03 2? 76??

City, town or post office, State and Zip Code
Berwick, Maine 03901

Occupation: Yours — Clerk-typist
Spouse's — Home life

1. Legal Residence. If Maine, show municipality. If outside Maine, show state or foreign country. Berwick

2. Exemptions—Total number of exemptions claimed on your 1970 Federal Income Tax return: 6

3. Your Filing Status—check only one.
☐ Single ☐ Married filing separately
☐ Married filing jointly ☒ Surviving widow(er) with dependent child
Name of spouse

4. ☒ Resident ☐ Nonresident ☐ Part year resident — enter dates that you were a Maine resident: from _____ to _____

5. Federal adjusted gross income (line 18, Federal Form 1040)		5	5925 97
6. Adjustments (page 2, schedule 1, line 5)		6	-0-
7. Maine adjusted gross income (line 5 added to or subtracted from line 6) (If line 7 is less than $10,000, and you do not itemize deductions, enter tax on line 12 from the appropriate table on pages 7 through 9 of the instructions.)		7	5925 97
8. Deductions: 13% of line 7, or itemized. (See instructions)	8		
9. Exemptions: multiply total number by $1,000	9		
10. Total amount for deductions and exemptions (add lines 8 and 9)		10	
11. Income subject to Maine Income Tax (subtract line 10 from line 7)		11	
12. Maine Income Tax (see instructions)		12	29 55
13. Credits: a. Maine Income Tax withheld (attach W-2)	13a 25 38		
b. 1970 Maine estimated tax paid	b		
c. Income tax paid to another jurisdiction (page 2, schedule 3, line 18)	c 15 17		
14. Total credits (add lines 13a, 13b, and 13c)		14	40 55
15. If line 12 is greater than line 14, enter BALANCE DUE. Pay in full with return.		15	
16. If line 14 is greater than line 12 enter OVERPAYMENT		16	21 00
17. Amount of line 16 to be ..... (a) CREDITED on 1971 estimated tax ☐ ☒ (b) REFUNDED		17	11 00

Do not use — for office use only: NM ☐ CK ☐ MO ☐ CA ☐

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

Your signature — Date 2/10/71

YOUR COPY

Signature of preparer other than taxpayer, based on all information of which he has any knowledge — Date 2/17/71

Address: 43 School Street, Berwick, Maine

Spouse's signature (if filing jointly, BOTH must sign even if only one had income)

Please file this return, together with check made payable to TREASURER OF STATE, with the DO NOT SEND CASH

Bureau of Taxation
Income Tax Division
State Office Building
Augusta, Maine 04330

EXHIBIT 1 (cont'd)

FORM 1040–ME PAGE 2

SCHEDULE 1 – ADJUSTMENTS

Additions

1. Income exempt from Federal Income Tax but taxable by Maine Law (resident individual only) ..... $

Deductions

2. Income exempt from Maine Income Tax but taxable by Federal Law (resident individual only) $
3. Income not derived from sources within Maine (nonresident individual only – schedule 4 below)
4. Add lines 2 and 3 .....
5. Net adjustment (subtract line 4 from line 1) enter here and on page 1, line 6 .....

SCHEDULE 2 – DEDUCTIONS

6. Total itemized deductions, Federal Form 1040 ..... $
7 a. Income taxes imposed by this State or any other taxing jurisdiction included in line 6 ..... $
b. Interest or expenses, included in line 6, incurred in the production of Maine exempt income ..... .
8. Add lines 7 a and 7 b .....
9. Subtract line 8 from line 6 .....
10. Interest or expenses, not included in line 6, incurred in the production of income taxable by Maine Law but exempt from Federal Income Tax .....
11. Add lines 9 and 10, enter here and (residents only) on Page 1, line 8 .....

LIMITATION OF DEDUCTIONS – NONRESIDENT INDIVIDUAL ONLY

12. Percentage limitation (Page 1, line 7, divided by your Maine adjusted gross income as if you were a resident) .....
13. Multiply line 11 by line 12, enter here and on page 1, line 8 .....

SCHEDULE 3–CREDIT FOR INCOME TAX PAID TO OTHER JURISDICTIONS
RESIDENT INDIVIDUAL ONLY

14. Maine adjusted gross income page 1, line 7 ..... $ 9926.57
15. Income taxed by other jurisdictions included in line 14 ..... 5204.05
16. Percentage of income taxed by other jurisdictions (divide line 15 by line 14) ..... 53.7 %
17. Limitation of Credit:
a. Page 1, line 12 multiplied by 53.7 % on line 16 ..... $ 15.17
b. Income taxes paid other jurisdictions 33.48
18. Allowable Credit, line 17a or 17b, whichever is less, enter here and on page 1, line 13c 15.17

SCHEDULE 4 – INCOME NOT DERIVED FROM SOURCES WITHIN MAINE
NONRESIDENT INDIVIDUAL ONLY

19. Wages, Salaries, Bonuses, Commissions, and Other Compensation included on page 1, line 5 Employer's Name	Where employed–City and State	Federal adjusted gross income A	Maine adjusted gross income B
20. Profit (or loss) from Business, Profession, Partnerships and Small Business Corporations			
21. All other Income			
22. Totals of column A and column B			
23. Enter column B total			
24. Subtract line 23 from line 22. Enter here and on line 3, schedule 1 above			

EXHIBIT 2

1000 CT

BUSINESS PROFITS TAX DIVISION

P.O. Box 637
Concord, N. H. 03301

7131

Commuters Nonresident Income Tax Return

For Calendar Year 1970 or other taxable year beginning , 19 and ending , 19 1970

First name and initial (if joint return, use first names and middle initials of both)	Last name	Your Social Security Number
[illegible] ELAINE M.	PEVERLY	015-10-5526
Home address (number and street or rural route)		Spouse's Social Security Number
55 Cobb Road		025-18-4254
City, town or post office, and State	Zip Code	
KITTERY MAINE	03904	

A. If married, are you filing a joint Federal Return? ☒ Yes ☐ No

B. Is your spouse filing a separate New Hampshire Return? ☐ Yes ☒ No
If "Yes," enter name of spouse.

1. New Hampshire derived income		7611.00
2. Less Exemption $2,000.00 (Husband and wife filing jointly — see instructions)		2000.00
3. New Hampshire Taxable income (line 1 less line 2)		5040.00
4. New Hampshire Commuters Income Tax (line 3 multiped by 4%)		201.54
5. Tax credit allowable by resident state on N H derived income	60.95	
6. Enter here amount on line 4 or 5, whichever is LESSER		60.95
7. CREDITS A. N.H. Commuters income tax withheld (attach W-2)	60.58	
B. 1970 Estimated Commuters tax paid	—	60.58
8. If line 7 is GREATER than line 6 enter BALANCE DUE here (Payable in full at time of filing this return)		.37
9. If line 7 is GREATER than line 6 enter OVERPAYMENT here		[illegible]
10. Apply OVERPAYMENT TO 1971 estimate or REFUND		[illegible]

Under the penalty of perjury, I declare that I examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct and complete. If prepared by a person other than taxpayer, his declaration is based on all information of which he has any knowledge.

Sign here [signature] March 29, 1971 Elaine M. Peverly 3/29/71
Taxpayer's signature and date (If joint return both husband and wife must sign) Wife's signature and date

Sign here
Signature of preparer other than taxpayer Address Date

THIS RETURN MUST BE ACCOMPANIED BY A LEGIBLE COPY OF THE RESIDENT STATE INCOME TAX RETURN FOR THE SAME TAXABLE PERIOD.

Please file this return, together with check made payable to

STATE OF NEW HAMPSHIRE

DIRECTOR
BUSINESS PROFITS TAX DIV.
P.O. BOX 637
CONCORD, NEW HAMPSHIRE 03301

EXHIBIT 2 (cont'd)

Simplex Wire & Cable Co.
Wells Road
North Berwick, Maine 03906
04-1837620

WAGE AND TAX STATEMENT 1970

Copy No. 2—To be filed with Employee's State or City Income Tax Return

NOTICE TO EMPLOYEE

THIS STATEMENT IS IMPORTANT. IT MUST BE ATTACHED TO YOUR STATE OR CITY INCOME TAX RETURN IN ORDER TO CLAIM CREDIT FOR ANY TAX WITHHELD

FEDERAL IDENT. NO.	STATE IDENT. NO.	INCOME TAX INFORMATION			SOCIAL SECURITY INFORMATION		STATE	
		Federal tax withheld	Wages, Tips, and other Compensation Paid in 1970	Other Compensation Paid in 1970	F.I.C.A. employee tax withheld	Total F.I.C.A. Wages Paid in 1970	Code	Gross Wages for State purposes Paid in 1970
		2,113.36	14,222.00		374.40	7,800.00	2	7,046.00

Type or print EMPLOYEE'S social security number

017-14-5346

Type or print EMPLOYEE'S name, address (including ZIP code) above

A W PEVERLY
85 ELIOT ROAD
KITTERY, MAINE

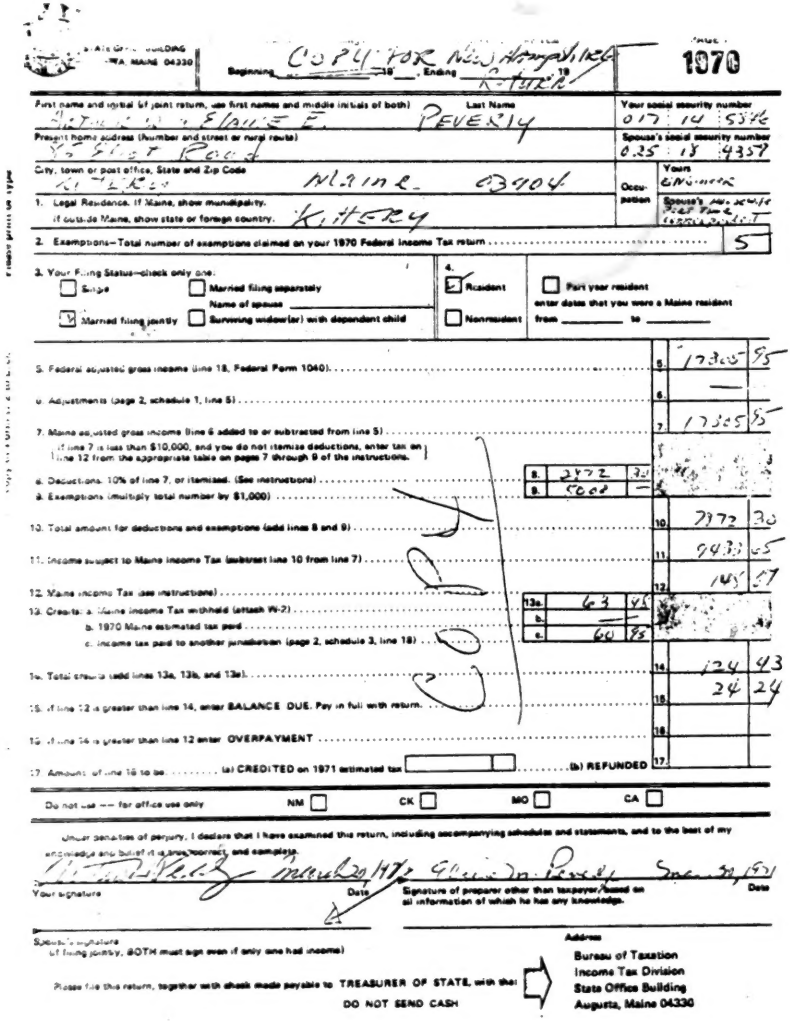
CITY TAX WITHHELD	STATE TAX WITHHELD
	60.88

Name of STATE	STATE Return NO
NEW HAMPSHIRE	
Name of CITY	CITY Return NO

* EMPLOYEE'S SOCIAL SECURITY TAX

** EMPLOYEE'S UNEMPLOYMENT INSURANCE TAX OR TDI

EXHIBIT 2 (cont'd)



1970

COPY FOR NEW HAMPSHIRE RETURN

Beginning ____ 19__, Ending ____ 19__

First name and initial (if joint return, use first names and middle initials of both) — Last Name: ARTHUR & ELAINE E. PEVERLY

Your social security number: 017 14 5516

Present home address (number and street or rural route): 20 Elliot Road

Spouse's social security number: 025 18 4357

City, town or post office, State and Zip Code: KITTERY Maine 03904

Your occupation: ENGINEER

Spouse's occupation: CHIEF FINANCIAL OFFICER

1. Legal Residence. If Maine, show municipality. If outside Maine, show state or foreign country: KITTERY

2. Exemptions—Total number of exemptions claimed on your 1970 Federal Income Tax return: 5

3. Your Filing Status—check only one.
- ☐ Single
- ☐ Married filing separately — Name of spouse ____
- ☑ Married filing jointly
- ☐ Surviving widow(er) with dependent child

4.
- ☑ Resident
- ☐ Nonresident
- ☐ Part year resident — enter dates that you were a Maine resident from ____ to ____

5. Federal adjusted gross income (line 18, Federal Form 1040)		5	17305 95
6. Adjustments (page 2, schedule 1, line 5)		6	—
7. Maine adjusted gross income (line 6 added to or subtracted from line 5)		7	17305 95
If line 7 is less than $10,000, and you do not itemize deductions, enter tax on line 12 from the appropriate table on pages 7 through 9 of the instructions.			
8. Deductions: 10% of line 7, or itemized. (See instructions)	8. 2772 30		
9. Exemptions (multiply total number by $1,000)	9. 5000 —		
10. Total amount for deductions and exemptions (add lines 8 and 9)		10	7772 30
11. Income subject to Maine Income Tax (subtract line 10 from line 7)		11	9433 65
12. Maine Income Tax (see instructions)		12	165 07
13. Credits: a. Maine Income Tax withheld (attach W-2)	13a. 63 45		
b. 1970 Maine estimated tax paid	13b. —		
c. Income tax paid to another jurisdiction (page 2, schedule 3, line 18)	13c. 60 98		
14. Total credits (add lines 13a, 13b, and 13c)		14	124 43
15. If line 12 is greater than line 14, enter BALANCE DUE. Pay in full with return.		15	24 24
16. If line 14 is greater than line 12 enter OVERPAYMENT		16	
17. Amount of line 16 to be ____ (a) CREDITED on 1971 estimated tax ____ (b) REFUNDED		17	

Do not use — for office use only: NM ☐ CK ☐ MO ☐ CA ☐

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

Your signature — Date: March 29, 1971

Signature of preparer other than taxpayer, based on all information of which he has any knowledge — Date: Mar 29, 1971

Spouse's signature (if filing jointly, BOTH must sign even if only one had income)

Please file this return, together with check made payable to TREASURER OF STATE, with the DO NOT SEND CASH

Address: Bureau of Taxation, Income Tax Division, State Office Building, Augusta, Maine 04330

EXHIBIT 2 (cont'd)

FORM 1040–ME, PAGE 2

SCHEDULE 1 – ADJUSTMENTS

Additions

1. Income exempt from Federal Income Tax but taxable by Maine Law (resident individual only) ..... $ ——

Deductions

2. Income exempt from Maine Income Tax but taxable by Federal Law (resident individual only) $ ——
3. Income not derived from sources within Maine (nonresident individual only – schedule 4 below) —— ——
4. Add lines 2 and 3 ..... ——
5. Net adjustment (subtract line 4 from line 1) enter here and on page 1, line 6 ..... ——

SCHEDULE 2 – DEDUCTIONS

6. Total itemized deductions, Federal Form 1040 ..... $ 3007.00
7. a. Income taxes imposed by this State or any other taxing jurisdiction included in line 6 ..... $ 134.70
   b. Interest or expenses, included in line 6, incurred in the production of Maine exempt income ..... ——
8. Add lines 7 a and 7 b 134.70
9. Subtract line 8 from line 6 ..... 2872.30
10. Interest or expenses, not included in line 6, incurred in the production of income taxable by Maine Law but exempt from Federal Income Tax ..... ——
11. Add lines 9 and 10, enter here and (residents only) on Page 1, line P 2872.30

LIMITATION OF DEDUCTIONS – NONRESIDENT INDIVIDUAL ONLY

12. Percentage limitation (page 1, line 7, divided by your Maine adjusted gross income as if you were a resident) ..... ——%
13. Multiply line 11 by line 12, enter here and on page 1, line 8 ..... ——

SCHEDULE 3–CREDIT FOR INCOME TAX PAID TO OTHER JURISDICTIONS RESIDENT INDIVIDUAL ONLY

14. Maine adjusted gross income page 1, line 7 ..... $ 17305.95
15. Income taxed by other jurisdictions included in line 14 ..... 2441.66
16. Percentage of income taxed by other jurisdictions (divide line 15 by line 14) ..... 41 %
17. Limitation of Credit:
    a. Page 1, line 12 multiplied by 41 % on line 16 ... 41% x 148.67 ..... $ 60.95
    b. Income taxes paid other jurisdictions 203.84
18. Allowable Credit, line 17a or 17b, whichever is less, enter here and on page 1, line 13c 60.95

SCHEDULE 4 – INCOME NOT DERIVED FROM SOURCES WITHIN MAINE NONRESIDENT INDIVIDUAL ONLY

19. Wages, Salaries, Bonuses, Commissions, and Other Compensation included on page 1, line 5 Employer's Name — Where employed–City and State	Federal adjusted gross income A	Maine adjusted gross income B
20. Profit (or loss) from Business, Profession, Partnerships and Small Business Corporations		
21. All other Income		
22. Totals of column A and column B		
23. Enter column B total		
24. Subtract line 23 from line 22. Enter here and on line 3, schedule 1 above		

EXHIBIT 3

ESTIMATED-RECORD

TAX YEAR

1st Payment

2nd Payment

Payment

Payment

BUSINESS PROFITS TAX DIVISION

P.O. Box 637
Concord, N. H. 03301

9966

For Calendar Year 1970 or other taxable year beginning Jan 1, 1970 and ending December 31, 1970 1970

NEW HAMPSHIRE Tax Return

(If joint return, use first names and middle initials of both)	Last name	Your Social Security Number
MARY S	LOGAN	342-36-7850
Number and street or rural route)		Spouse's Social Security Number
24 EXETER ROAD		040-22-9281
City, town or post office, and State	Zip Code	
WINDHAM	03909	

A. If married, are you filing a joint Federal Return? ☑ Yes ☐ No

B. Is your spouse filing a separate New Hampshire Return? ☐ Yes ☐ No
If "Yes," enter name of spouse.

1. New Hampshire derived income		32,000
2. Less: Exemption $2,000.00 (Husband and wife filing jointly — see instructions)		2,000
3. New Hampshire Taxable income (line 1 less line 2)		30,000
4. New Hampshire Commuters Income Tax (line 3 multiplied by 4%)		1200
5. Tax credit allowable by resident state on N. H. derived income	898.00	
6. Enter here amount on line 4 or 5, whichever is LESSER	898.00	
7. CREDITS A. N.H. Commuters Income tax withheld (attach W-2)	252	
B. 1970 Estimated Commuters tax paid		252
8. If line 6 is GREATER than line 7 enter BALANCE DUE here → (Payable in full at time of filing this return)	646.00	0
9. If line 7 is GREATER than line 6 enter OVERPAYMENT here		0
10. Apply OVERPAYMENT TO 1971 estimate or REFUND		

Under penalties of perjury, I declare that I examined this return including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct and complete. If prepared by a person other than taxpayer, his declaration is based on all information of which he has any knowledge.

Sign here: Taxpayer's signature and date — If joint return both husband and wife must sign — Wife's signature and date

Sign here: Signature of preparer other than taxpayer — RUSSELL S. CARY & CO., C.P.A.'s, address, 24 Porter Street, Melrose, Mass. 02176 — date

THIS RETURN MUST BE ACCOMPANIED BY A LEGIBLE COPY OF THE RESIDENT STATE INCOME TAX RETURN FOR THE SAME TAXABLE PERIOD.

Please file this return, together with check made payable to:

STATE OF NEW HAMPSHIRE
DIRECTOR
BUSINESS PROFITS TAX DIV.

EXHIBIT 3 (cont'd)

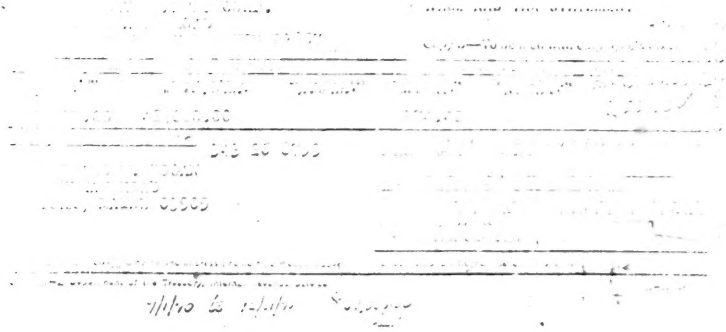
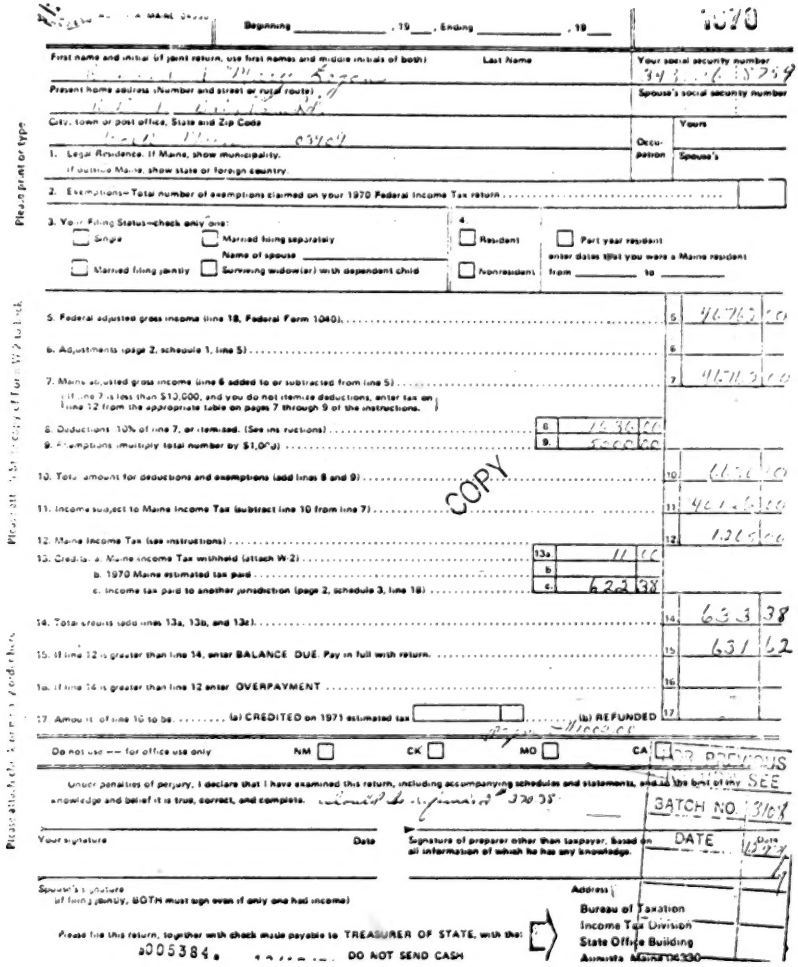


EXHIBIT 3 (cont'd)



1970

Beginning _____, 19___, Ending _____, 19___

First name and initial (if joint return, use first names and middle initials of both) | Last Name | Your social security number

Present home address (Number and street or rural route) | Spouse's social security number

City, town or post office, State and Zip Code | Yours

Occupation | Spouse's

Please print or type

1. Legal Residence. If Maine, show municipality. If outside Maine, show state or foreign country.

2. Exemptions—Total number of exemptions claimed on your 1970 Federal Income Tax return

3. Your Filing Status—check only one:
Single | Married filing separately (Name of spouse) | Married filing jointly | Surviving widow(er) with dependent child

4. Resident | Nonresident | Part year resident enter dates that you were a Maine resident from _____ to _____

5. Federal adjusted gross income (line 18, Federal Form 1040) — 5 — 46 76[illegible]

6. Adjustments (page 2, schedule 1, line 5) — 6

7. Maine adjusted gross income (line 6 added to or subtracted from line 5) — 7 — 46 71[illegible]

(If line 7 is less than $10,000, and you do not itemize deductions, enter tax on line 12 from the appropriate table on pages 7 through 9 of the instructions.)

8. Deductions: 10% of line 7, or itemized. (See instructions) — 8 — 1936[illegible]

9. Exemptions (multiply total number by $1,000) — 9 — 5000 00

10. Total amount for deductions and exemptions (add lines 8 and 9) — 10 — 6[illegible]

11. Income subject to Maine Income Tax (subtract line 10 from line 7) — 11 — 40[illegible]

12. Maine Income Tax (see instructions) — 12 — 1[illegible]

13. Credits: a. Maine income Tax withheld (attach W-2) — 13a — 11[illegible]
b. 1970 Maine estimated tax paid — 13b
c. Income tax paid to another jurisdiction (page 2, schedule 3, line 18) — 13c — 622 38

14. Total credits (add lines 13a, 13b, and 13c) — 14 — 633 38

15. If line 12 is greater than line 14, enter BALANCE DUE. Pay in full with return. — 15 — 631 62

16. If line 14 is greater than line 12 enter OVERPAYMENT — 16

17. Amount of line 16 to be: (a) CREDITED on 1971 estimated tax _____ (b) REFUNDED — 17

COPY

Please attach check or money order here

Do not use — for office use only NM ☐ CK ☐ MO ☐ CA ☐

PREVIOUS

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

SEE BATCH NO. 3168

Your signature | Date | Signature of preparer other than taxpayer. Based on all information of which he has any knowledge. | DATE | Date

Spouse's signature (if filing jointly, BOTH must sign even if only one had income)

Address

Please file this return, together with check made payable to TREASURER OF STATE, with the:

Bureau of Taxation
Income Tax Division
State Office Building
Augusta, Maine 04330

0005384 DO NOT SEND CASH

EXHIBIT 3 (cont'd)

Additions

1. Income exempt from Federal Income Tax but taxable by Maine Law (resident individual only) ..... $ _____

Deductions

2. Income exempt from Maine Income Tax but taxable by Federal Law (resident individual only) $ _____
3. Income not derived from sources within Maine (nonresident individual only – schedule 4 below) _____
4. Add lines 2 and 3 ..... _____
5. Net adjustment (subtract line 4 from line 1) enter here and on page 1, line 6 ..... _____

SCHEDULE 2 – DEDUCTIONS

6. Total itemized deductions, Federal Form 1040 ..... $ _____
7. a. Income taxes imposed by this State or any other taxing jurisdiction included in line 6 ..... $ _____
   b. Interest or expenses, included in line 6, incurred in the production of Maine exempt income ..... _____
8. Add lines 7 a and 7 b ..... _____
9. Subtract line 8 from line 6 ..... _____
10. Interest or expenses, not included in line 6, incurred in the production of income taxable by Maine Law but exempt from Federal Income Tax ..... _____
11. Add lines 9 and 10, enter here and (residents only) on Page 1, line 8 ..... _____

LIMITATION OF DEDUCTIONS – NONRESIDENT INDIVIDUAL ONLY

12. Percentage limitation (page 1, line 7, divided by your Maine adjusted gross income as if you were a resident) ..... _____ %
13. Multiply line 11 by line 12, enter here and on page 1, line 8 ..... _____

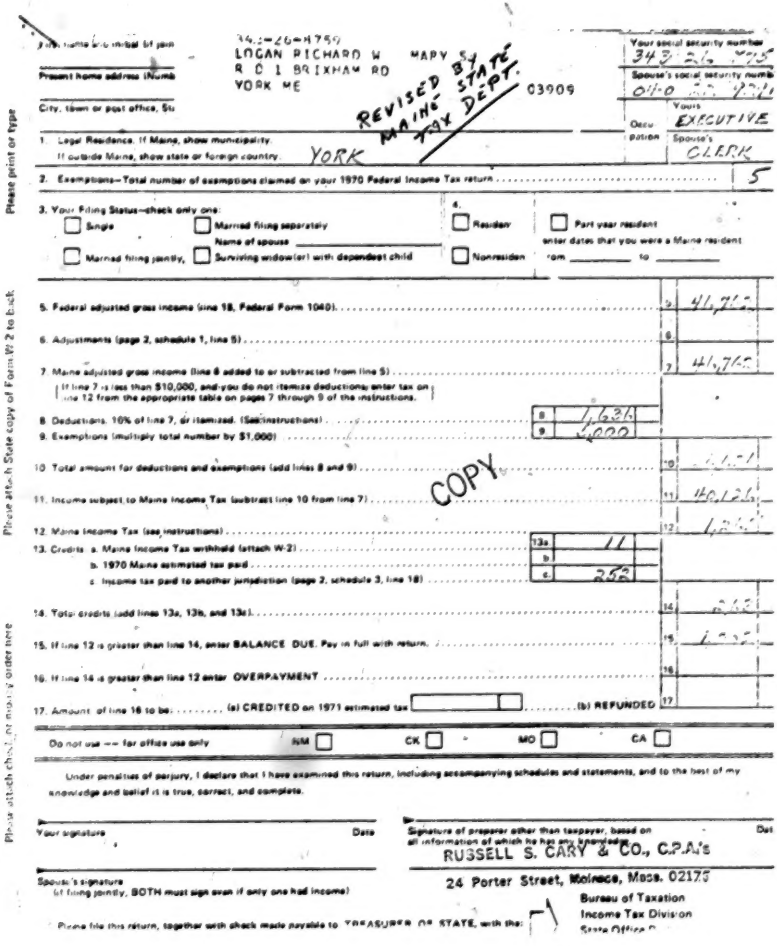
SCHEDULE 3–CREDIT FOR INCOME TAX PAID TO OTHER JURISDICTIONS
RESIDENT INDIVIDUAL ONLY

14. Maine adjusted gross income page 1, line 7 ..... $ 46,707.00
15. Income taxed by other jurisdictions included in line 14 ..... $ of 46,000.00 — 23,000.00
16. Percentage of income taxed by other jurisdictions (divide line 15 by line 14) 49.2%
17. Limitation of Credit:
    a. Page 1, line 12 multiplied by 49.2 % on line 16 ..... $ 622.38
    b. Income taxes paid other jurisdictions ..... $ 840.00
18. Allowable Credit, line 17a or 17b, whichever is less, enter here and on page 1, line 13c 622.38

SCHEDULE 4 – INCOME NOT DERIVED FROM SOURCES WITHIN MAINE
NONRESIDENT INDIVIDUAL ONLY

19. Wages, Salaries, Bonuses, Commissions, and Other Compensation included on page 1, line 5 Employer's Name	Where employed–City and State	Federal adjusted gross income A	Maine adjusted gross income B
20. Profit (or loss) from Business, Profession, Partnerships and Small Business Corporations			
21. All other income			
22. Totals of column A and column B			
23. Combine line 22 total			
24. Subtract line 23 from line 22, enter here and on line 4, schedule 1 above			

EXHIBIT 3 (cont'd)



Please print or type

LOGAN RICHARD W MARY S
R C 1 BRIXHAM RD
YORK ME 03909

REVISED BY MAINE STATE TAX DEPT.

Your social security number 343-26-4755
Spouse's social security number 014-0[illegible]-4241

Occupation: Yours EXECUTIVE; Spouse's CLERK

1. Legal Residence. If Maine, show municipality. If outside Maine, show state or foreign country. YORK

2. Exemptions—Total number of exemptions claimed on your 1970 Federal Income Tax return 5

3. Your Filing Status—check only one:
☐ Single ☐ Married filing separately
Name of spouse
☐ Married filing jointly, ☐ Surviving widow(er) with dependent child

4. ☐ Resident ☐ Part year resident enter dates that you were a Maine resident from _____ to _____
☐ Nonresident

Please attach State copy of Form W-2 to back

5. Federal adjusted gross income (line 18, Federal Form 1040) 5 41,715

6. Adjustments (page 2, schedule 1, line 5) 6

7. Maine adjusted gross income (line 6 added to or subtracted from line 5) 7 41,715
If line 7 is less than $10,000, and you do not itemize deductions, enter tax on line 12 from the appropriate table on pages 7 through 9 of the instructions.

8. Deductions. 10% of line 7, or itemized. (See instructions) 8 1,631
9. Exemptions (multiply total number by $1,000) 9 5,000

10. Total amount for deductions and exemptions (add lines 8 and 9) 10 6,631

11. Income subject to Maine Income Tax (subtract line 10 from line 7) 11 35,084

12. Maine Income Tax (see instructions) 12 1,254

13. Credits a. Maine Income Tax withheld (attach W-2) 13a 11
b. 1970 Maine estimated tax paid ..... b
c. Income tax paid to another jurisdiction (page 2, schedule 3, line 18) ..... c 252

14. Total credits (add lines 13a, 13b, and 13c) 14 263

15. If line 12 is greater than line 14, enter BALANCE DUE. Pay in full with return. 15 991

16. If line 14 is greater than line 12 enter OVERPAYMENT 16

17. Amount of line 16 to be: ..... (a) CREDITED on 1971 estimated tax [ ] ..... (b) REFUNDED 17

Please attach check or money order here

Do not use — for office use only NM ☐ CK ☐ MO ☐ CA ☐

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

Your signature Date

Spouse's signature (if filing jointly, BOTH must sign even if only one had income)

Signature of preparer other than taxpayer, based on all information of which he has any knowledge Date

RUSSELL S. CARY & CO., C.P.A.'s
24 Porter Street, Moiness, Mass. 02175

Please file this return, together with check made payable to TREASURER OF STATE, with the:
Bureau of Taxation
Income Tax Division
State Office B[illegible]

COPY

EXHIBIT 3 (cont'd)

Additions

1. Income exempt from Federal Income Tax but taxable by Maine Law (resident individual only) ..... $ _____

Deductions

2. Income exempt from Maine Income Tax but taxable by Federal Law (resident individual only) $ _____
3. Income not derived from sources within Maine (nonresident individual only – schedule 4 below) _____
4. Add lines 2 and 3 ..... _____
5. Net adjustment (subtract line 4 from line 1) enter here and on page 1, line 6 ..... _____

SCHEDULE 2 – DEDUCTIONS

6. Total itemized deductions Federal Form 1040 ..... $ 6127
7. a Income taxes imposed by this State or any other taxing jurisdiction included in line 6 ..... $ 503
   b Interest or expenses, included in line 6, incurred in the production of Maine exempt income ..... _____
8. Add lines 7 a and 7 b 503
9. Subtract line 8 from line 6 5624
10. Interest or expenses, not included in line 6, incurred in the production of income taxable by Maine Law but exempt from Federal Income Tax ..... _____
11. Add lines 9 and 10, enter here and (residents only) on Page 1, line 8 5624

LIMITATION OF DEDUCTIONS – NONRESIDENT INDIVIDUAL ONLY

12. Percentage limitation (page 1, line 7, divided by your Maine adjusted gross income as if you were a resident) ..... _____
13. Multiply line 11 by line 12, enter here and on page 1, line 8 ..... _____

SCHEDULE 3–CREDIT FOR INCOME TAX PAID TO OTHER JURISDICTIONS
RESIDENT INDIVIDUAL ONLY

14. Maine adjusted gross income page 1, line 7 ..... $ 41,225
15. Income taxed by other jurisdictions included in line 14 22,000
16. Percentage of income taxed by other jurisdictions (divide line 15 by line 14) 53%
17. Limitation of Credit
    a. Page 1, line 12 multiplied by 25% on line 16 ..... $ 1240
    b. Income taxes paid other jurisdictions 503
18. Allowable Credit, line 17a or 17b, whichever is less, enter here and on page 1, line 13c 503

SCHEDULE 4 – INCOME NOT DERIVED FROM SOURCES WITHIN MAINE
NONRESIDENT INDIVIDUAL ONLY

19. Wages, Salaries, Bonuses, Commissions, and Other Compensation included on page 1, line 5 Employer's Name	Where employed–City and State	Federal adjusted gross income A	Maine adjusted gross income B
20. Profit (or loss) from Business, Profession, Partnerships and Small Business Corporations			
21. All other income			
22. Totals of column A and column B			
23. Enter column B total			
24. Subtract line 23 from line 22. Enter here and on line 3, schedule 1 above			

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1974

No.

CARL M. AUSTIN, et al., Appellants

v.

STATE OF NEW HAMPSHIRE, et al., Appellees

On Appeal from the Supreme
Court of the State of New Hampshire

JURISDICTIONAL STATEMENT

Appellants appeal from the final order and judgment of the Supreme Court of the State of New Hampshire, entered on February 28, 1974 declaring the New Hampshire Commuters Income Tax, N.H. RSA Ch. 77-B, not violative of the privileges and immunities and equal protection clauses of the United States Constitution. This statement is sub-

mitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented. A copy of the Notice of Appeal from the Supreme Court of New Hampshire is attached hereto (Appendix A, infra, pp. A1-A3).

OPINION BELOW

The opinion of the Supreme Court of the State of New Hampshire is reported in 316 A.2d 165 as Carl M. Austin et al. v. State Tax Commission, Merrimack No. 6641. A copy of the opinion is attached hereto (Appendix B, infra, pp. A4-A9).

JURISDICTION

(i) This suit was instituted as a petition by three residents of the State of Maine before the Superior Court of the State of New Hampshire for Merrimack County against the State of New Hampshire, the Commissioners of the New Hampshire Tax Commission and the Director of the Business Profits Division of the New Hampshire Tax Commission individually and in their respective capacities, seeking a declaratory judgment that N.H. RSA Ch. 77-B, the New Hampshire Commuters Income Tax, was (inter alia) in violation of the rights of the petitioners under the Constitution of the United States of America.

The defendants moved to dismiss, which motion was denied and defendants seasonably excepted. All questions of

law raised by the petition and the action of the Superior Court on the motion to dismiss were reserved and transferred to the Supreme Court of the State of New Hampshire without ruling. A copy of the order of the New Hampshire Superior Court reserving and transferring the case is attached hereto (Appendix C, infra, pp. A10-A11).

(ii) The final determination of the Supreme Court of the State of New Hampshire, the Court below, was entered on February 28, 1974. The Notice of Appeal (Appendix A, infra, pp. A1-A3) dated May 9, 1974, was filed in the Court below on May 13, 1974.

(iii) The jurisdiction of this Court to review the judgment below on direct appeal is conferred by 28 U.S.C.A. §1257(2).

(iv) The state statute, which as construed by the Supreme Court of the State of New Hampshire is not violative of appellants' rights under the privileges and immunities clause or the equal protection clause of the United States Constitution, is the State of New Hampshire Revised Statutes Annotated Ch. 77-B (as enacted by Chapter 20, N.H. Laws of 1970 and amended by Chapter 57, N.H. Laws of 1970) (Appendix D, infra, pp. A12-A). The State of Maine imposes a tax on the income of residents regardless of source, and the income of nonresidents derived from sources within

Maine (36 M.R.S.A. §5111). A credit is provided by Maine for its residents against the Maine tax for taxes paid to foreign jurisdictions on income also taxable in Maine (36 M.R.S.A. §5127). These statutory provisions are also attached hereto (Appendix E, infra, p. A22).

(v) The authorities relied on to substain the substantiality of the questions presented are --

a. In respect to the violation of the Privileges and Immunities Clause of Article IV §2 of the United States Constitution. Mullaney v. Anderson 342 U.S. 415 (1952); Toomer v. Witsell 334 U.S. 385, 395 (1948); Travis v. Yale & Towne Mfg. Co. 252 U.S. 60, 80-81 (1920); Shaffer v. Carter 252 U.S. 43, 52-53 (1920); Ward v. Maryland 79 U.S. 418, 430 (1870).

b. In respect to the violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Colgate v. Harvey 296 U.S. 404 (1935).

QUESTIONS PRESENTED

1. Whether a New Hampshire statute which taxes income of nonresidents earned in New Hampshire but which does not tax income of residents earned in New Hampshire violates the Privileges and Immunities Clause of Article IV §2 of the United States Constitution?

2. Whether a New Hampshire statute which taxes income of nonresidents earned in New Hampshire but which does not tax income of residents earned in New Hampshire violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

STATEMENT

Appellants are residents of the State of Maine who during the taxable year 1970 earned income in the State of New Hampshire. A tax was imposed by the State of New Hampshire on the appellants' income earned in New Hampshire under the authority of the N.H. RSA Ch. 77-B 2 II (Appendix D, infra, p. A14). The tax imposed in 1970 was withheld from appellants' wages by their employers pursuant to the N.H. RSA Ch. 77-B:10 (Appendix D, infra, pp. A16-A17).

Appellants paid the tax imposed by the State of New Hampshire and received a credit from the State of Maine for the New Hampshire tax paid. The State of Maine imposed a tax on the entire taxable income of residents and the income of nonresidents derived from sources within Maine (36 M.R.S.A. §5111) (Appendix E, infra, p. A22). The State of Maine gives a credit to residents for taxes paid other jurisdictions (36 M.R.S.A. §5127) (Appendix E, infra, pp. A22-A23).

Appellants brought a petition for

declaratory judgment on behalf of themselves and other taxpayers similarly situated before the New Hampshire Superior Court for Merrimack County, challenging the constitutionality of the New Hampshire Commuters Income Tax under the Constitution of the United States and the Constitution of the State of New Hampshire. The appellees brought a motion to dismiss, which was denied. Exceptions were noted by the Superior Court and all issues were transferred to the New Hampshire Supreme Court (Appendix C, infra, pp. A10-A11).

The New Hampshire Supreme Court held the appellants had standing to challenge the tax imposed. Austin v. State Tax Commission 316 A.2d 165, 166. The Court went on to hold the tax imposed was not in violation of the privileges and immunities and equal protective clauses of the Federal or the State constitution. Id. at 167, 168.

THE QUESTIONS ARE SUBSTANTIAL

The Supreme Court of the State of New Hampshire, the Court of last resort of the State of New Hampshire, in the decision below decided in favor of the validity of the constitutionality of N.H. RSA Ch. 77-B, the New Hampshire Commuters Income Tax. The Court in its decision considered the arguments of appellants against the validity of the tax, which were grounded in the privi-

leges and immunities and equal protection clauses of the Constitution of the United States and of New Hampshire. Austin v. State Tax Commission 316 A.2d 165, 166.

This Honorable Court has jurisdiction to hear this appeal provided it is satisfied that the questions presented are substantial. In Charlestown Assn. v. Alderson 324 U.S. 182, 185-186 the Supreme Court stated:

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court."

Tax liability under the New Hampshire Commuters Income Tax, N.H. RSA Ch. 77-B, depends on whether or not one is a resident of the State of New Hampshire. If one is a resident of New Hampshire he will never pay a tax under the provisions of the New Hampshire Commuters Income Tax. The statute contains no provision for a tax on income earned in New Hampshire by New Hampshire residents.

The statute does purport to levy a tax on income of residents derived from

outside of New Hampshire.

> "A tax is hereby imposed upon every resident of the state, which shall be levied, collected and paid annually at the rate of four percent of their income which is derived outside the state of New Hampshire as defined in RSA 77-B:1 'New Hampshire taxable income;' provided, however, that if such income shall be subject to a tax in the state in which it is derived, such tax shall constitute full satisfaction of the tax hereby imposed; and provided further, that if such income is exempt from taxation because of statutory or constitutional provisions in the state in which it is derived, or because the state in which it is derived does not impose an income tax on such income, it shall be exempt from taxation under this paragraph." RSA 77-B:2 I

Effectively no tax will ever be paid on income derived outside of New Hampshire. A full credit is given for whatever tax is levied by another state on income earned outside New Hampshire by New Hampshire residents and if no tax is levied by another state, no tax is levied by New Hampshire on its residents under the provisions of the New Hampshire Commuters Income Tax. Even if one were to assume that New Hampshire residents are being taxed under the provisions of N.H. RSA 77-B2 I, the amount of tax would vary depending on the tax structure of the jurisdiction in which the New Hampshire resident was deriving income.

Thus, even as between New Hampshire residents there is discrimination if one accepts the premise that a tax is effectively levied on New Hampshire residents.

In contrast to the New Hampshire resident working in New Hampshire who never pays a tax, a Maine resident or a resident of Massachusetts or Vermont or any other nonresident of New Hampshire working alongside the New Hampshire resident, with the same earnings, marital status and number of dependents would pay the tax imposed by N.H. RSA 77-B II. Even as among the residents of Maine, Massachusetts and Vermont and other nonresidents of New Hampshire with the same earnings, marital status and number of dependents, the tax imposed by N.H. RSA 77-B II can differ in amount and is discriminatory.

An imposition of such an income tax upon nonresidents and not upon residents is in direct violation of the privileges and immunities clause of the Constitution of the United States.

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." United States Constitution Article IV Sec. 2.

The purpose of the privileges and immunities clause is well stated in Toomer v. Witsell 334 U.S. 385 (1948) by Chief Justice Vinson:

"The primary purpose ... was to fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." Id at 395

In Toomer v. Witsell, supra the State of South Carolina attempted to impose higher license taxes on nonresidents who caught shrimp off the coast of South Carolina than that imposed upon South Carolina shrimp fishermen. The Court held that the South Carolina statute violated Article IV §2 of the United States Constitution (the privileges and immunities clause). In addition, the South Carolina statute was also held to be in violation of commerce clause Art. 1 §8 of the United States Constitution. The Toomer case differs from the instant case in that the South Carolina statute held to be unconstitutional did impose a license tax upon its own residents albeit one hundred times less than the license tax upon the nonresidents. See also Mullaney v. Anderson 342 U.S. 415, N.H. RSA Ch. 77-B, the New Hampshire Commuters Income Tax, imposes no tax on New Hampshire residents deriving income in New Hampshire while imposing a tax of four percent of New Hampshire derived income with certain limitations upon nonresidents.

In a case involving the general income tax law of the State of New York,

the United States Supreme Court invalidated those portions of the law which permitted residents greater personal exemptions than those granted nonresidents. Travis v. Yale & Towne Mfg. Co. 252 U.S. 60 (1920). Justice Pitney speaking for the court said

> "In the concrete, the particular incidence of the discrimination is upon citizens of Connecticut and New Jersey, neither of which States has an income tax law. A considerable number of complainant's employees, residents and citizens of one or the other of those States, spend their working time at its office in the city of New York, and earn their salaries there. The case is typical; it being a matter of common knowledge that from necessity due to the geographical situation of that city, in close proximity to the neighboring States, many thousands of men and women, residents and citizens of those States, go daily from their homes to the city and earn their livelihood there. They pursue their several occupations side by side with residents of the State of New York -- in effect competing with them as to wages, salaries, and other terms of employment. Whether they must pay a tax upon the first $1,000 or $2,000 of income, while their associates and competitors who reside in New York do not, makes

> a substantial difference. Under the circumstances as disclosed, we are unable to find adequate ground for the discrimination, and are constrained to hold that it is an unwarranted denial to the citizens of Connecticut and New Jersey of the privileges and immunities enjoyed by citizens of New York. This is not a case of occasional or accidental inequality due to circumstances personal to the taxpayer (see Amoskeag Savings Bank v. Purdy, 231 U.S. 373, 393-394; Maxwell v. Bugbee, 250 U.S. 525, 543); but a general rule, operating to the disadvantage of all nonresidents including those who are citizens of the neighboring States, and favoring all residents including those who are citizens of the taxing State." Id. at 80, 81

The instant case is different from the Travis case supra in that in the case before this court no income tax is levied upon New Hampshire residents working in New Hampshire while in the Travis case an income tax was levied upon residents of the State of New York. However, the rationale of the Travis case as to violation of privileges and immunities of nonresidents applies to the instant case. For both cases a discrimination against nonresidents exists. In the instant case appellants contend the discrimination is even more severe in that no tax is levied upon New Hampshire residents working in New Hampshire.

In addition to the substantial question whether the New Hampshire Commuters Income Tax violates the privileges and immunities granted by the United States Constitution to the citizens of each state, there is also the substantial question whether the New Hampshire Commuters Income Tax violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.

States may resort to classification for the purpose of taxation. Royster Guano Co. v. Virginia 253 U.S. 412, 415 and this power to classify is of wide range and flexibility. Louisville Gas Co. v. Coleman 277 U.S. 32, 37. However a tax which results in arbitrary discrimination is a denial of the equal protection of the law. As was stated by the Supreme Court in Colgate v. Harvey 296 U.S. 404, 423

> "The classification, in order to avoid the constitutional prohibition, must be founded upon pertinent and real differences, as distinguished from irrelevant and artificial ones. The test to be applied in such cases as the present one is -- does the statute arbitrarily and without genuine reason impose a burden upon one group of taxpayers from which it exempts another group, both of them occupying substantially the same relation toward the subject matter of the legislation?"

Appellants contend a substantial question is raised when an income tax statute taxing income of nonresidents derived in a taxing jurisdiction does not tax the income of residents in that jurisdiction. Appellants submit this is an arbitrary classification imposing a burden upon one group of taxpayers (nonresidents) without imposing a similar burden on another group of taxpayers (residents).

Although appellants are not immediately paying out more tax dollars they are directly injured. It is true appellants receive a credit from the State of Maine for Commuters Income Tax paid the State of New Hampshire but appellants strenuously disagree with the following statement of the New Hampshire Supreme Court in Austin v. State Tax Commission 316 A.2d 165, 167 (see Appendix B, infra, p. A7).

> "Since these plaintiffs pay no greater tax by reason of the New Hampshire tax than they would otherwise pay to Maine, they are not prejudiced by the Commuters Income Tax."

The services provided by the State of New Hampshire to nonresidents and residents for which nonresidents are paying tax dollars under N.H. RSA Ch. 77-B, are not being paid for on a proportional basis by residents under N.H. RSA Ch. 77-B. In fact no tax dollars are being paid under N.H. RSA Ch. 77-B

by New Hampshire residents to provide these services. If New Hampshire residents were taxed on New Hampshire derived income under N.H. RSA Ch. 77-B at the same rate as Maine residents, there would be more tax dollars to provide additional services in New Hampshire to residents and nonresidents. On the other hand if services paid for by taxes under N.H. RSA Ch. 77-B were to remain at the same level and the residents shared the tax burden with appellants under N.H. RSA Ch. 77-B, the appellants would be paying a lower tax. Appellants are injured as residents of New Hampshire are not sharing the tax burden under N.H. RSA Ch. 77-B.

The appellants do not object to paying tax dollars to the State of New Hampshire provided New Hampshire residents pay tax dollars on the same basis. However, when tax dollars are not paid on the same basis by residents and nonresidents, as in the instant case, the plaintiffs are suffering a very real injury, as tax dollars being collected under a law which, if appellants are correct, violates the privileges and immunities clause of the United States Constitution as well as the equal protection clause, are being diverted from appellants' domiciliary state.

CONCLUSION

On income earned in New Hampshire, Maine residents are subject to the New Hampshire Commuters Income Tax, N.H. RSA Ch. 77-B. On income earned in New Hampshire, residents of New Hampshire are not subject to the New Hampshire

Commuters Income Tax. Appellants contend such a discrimination on the basis of residency is a violation of the privileges and immunities of the citizens of the State of Maine paying taxes pursuant to N.H. RSA Ch. 77-B. The taxing provisions of N.H. RSA Ch. 77-B when applied to the appellants result in an abridgement of their Federal constitutional right to have the same privileges and immunities under the laws of the State of New Hampshire as residents of New Hampshire and their right to equal protection under the laws of the State of New Hampshire. Appellants claim these rights have been adversely affected by the operation of N.H. RSA Ch. 77-B and a justiciable controversy exists as to their claim. This Court should therefore note probable jurisdiction of the present appeal.

Respectfully submitted.

George F. Wood
199 Main Street
Saco, Maine 04072
Counsel for the Appellants

Charles W. Smith, Esq.
199 Main Street
Saco, Maine 04072

Of Counsel

July 1974

APPENDIX A

In the Supreme Court of
State of New Hampshire

Carl M. Austin,
Arthur W. Peverly and
Richard W. Logan,
Appellants

v.

The State of New Hampshire,
Lawton Chandler, William
Conway and William Maynard,
Tax Commissioners and
Lawrence Blake, Director
of the Business Profits
Division of the New
Hampshire Tax Commission,
Appellees

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Carl M. Austin, Arthur W. Peverly and Richard W. Logan, the appellants above-named, hereby appeal to the Supreme Court of the United States from the final order and judgment of the Supreme Court of the State of New Hampshire, declaring the New Hampshire Commuters Income Tax, RSA Ch. 77-B, not violative of the privileges and immunities and equal protection clauses of the United States Constitution, entered herein on February 28, 1974.

This appeal is taken pursuant to

28 U.S.C. §1257(2).

/s/Charles W. Smith
Smith, Elliott, Wood & Nelson
Counsel for Appellants
by Charles W. Smith
Saco, Maine

AFFIDAVIT OF SERVICE

I, Charles W. Smith, an attorney in the office of Messrs. Smith, Elliott, Wood & Nelson, P.A., attorneys of record for Carl M. Austin, Arthur W. Peverly and Richard W. Logan, appellants herein, depose and say that on the ninth day of May, 1974, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the State of New Hampshire, Lawton Chandler, William Conway and William Maynard, Tax Commissioners and Lawrence Blake, Director of the Business Profits Division of the New Hampshire Tax Commission, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to Warren B. Rudman, Attorney General of the State of New Hampshire, Office of the Attorney General, State House Annex, Concord, New Hampshire, counsel of record for the appellees.

/s/Charles W. Smith
Charles W. Smith

State of Maine
York, ss.

Subscribed and sworn to before me, at Saco this ninth day of May, 1974.

/s/Tamara G. Rumery
Notary Public

My commission expires:

March 13, 1981

APPENDIX B

Carl M. AUSTIN et al.

v.

STATE TAX COMMISSION.

No. 6641.

Supreme Court of New Hampshire,

Merrimack.

Feb. 28, 1974.

GRIMES, Justice

Three residents of Maine who earned income while working in New Hampshire challenge the constitutionality of the New Hampshire Commuters Income Tax. RSA ch. 77-B. During taxable year 1970 plaintiffs, as nonresidents of New Hampshire earning income in New Hampshire, had withheld from their wages by their employers a tax based on the amount of income they earned in New Hampshire. RSA 77-B:10. Plaintiffs paid the tax and brought a petition for declaratory judgment on behalf of themselves and other residents of Maine similarly situated, challenging the tax as violative of the Constitutions of the United States and New Hampshire. Defendant's motion to dismiss was denied, exceptions noted and all issues raised were transferred to this court without ruling by Flynn, J.

An understanding of the operation of the Maine Income Tax is necessary to consider defendant's argument that plaintiffs

lack standing to bring this action. Maine levies a tax on the income of residents regardless of its source and on the income of nonresidents which is derived from sources within that State. 36 Me. Rev. Stat. Ann. §5111 (Supp. 1973). Maine provides a credit for its residents against the Maine tax for any taxes paid to foreign jurisdictions on income also taxable in Maine. 36 Me. Rev. Stat. Ann. § 5127 (Supp. 1973); see Opinion of the Justices, 110 N.H. 26, 259 A.2d 660 (1969). In complement to the Maine statute, the New Hampshire Commuters Income Tax is limited so as not to exceed any income tax which would be payable to the commuter's home state if the income were earned and taxed in that State. RSA 77-B:2 II.

[1] The effect of the Maine credit and the New Hampshire limitation is that New Hampshire collects a tax from Maine residents working in New Hampshire which otherwise would be paid in the same amount to the State of Maine. Defendant contends that, because the Commuters Income Tax imposes no tax burden beyond that otherwise owed the State of Maine, the plaintiffs lack standing. Considering the policy of providing accessibility to the courts for the settlement of grievances and for challenging the use of power by government, we hold that the claims of these plaintiffs are entitled to consideration.

[2] Defendant also contends that declaratory relief is not available to the plaintiffs as they should have proceeded by way of a petition for abatement under RSA 77-B:22. "A petition for declaratory judgment is particularly appro-

priate to determine the constitutionality of a statute when the parties desire and the public need requires a speedy determination of important public interests involved therein". Chronicle, etc., & Gazette Pub. Co. v. Attorney-General, 94 N.H. 148, 150, 48 A.2d 478, 479-480 (1946); Levitt v. Maynard, 104 N.H. 243, 182 A.2d 897 (1962); Carbonneau v. Company, 96 N.H. 240, 73 A.2d 802 (1950).

Petitioners' argument against the tax is grounded in the privileges and immunities and equal protection clauses of the Constitutions of the United States and of New Hampshire. The purpose and scope of these clauses have been described as placing citizens of each State on the same footing as those of other States in a variety of ways including acquisition and enjoyment of property, free ingress to and egress from other states, and engaging in lawful commerce, trade or business without molestation. Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 78, 40 S.Ct. 228, 231, 64 L.Ed. 460, 469, (1920); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 19 L.Ed. 357 (1868); Ward v. Maryland, 79 U.S. (12 Wall.) 418, 20 L. Ed, 449 (1870).

In a companion case to Travis, the Supreme Court in deciding whether or not a State has jurisdiction to impose an income tax on nonresidents, said "where the question is whether a state taxing law contravenes rights secured by that instrument [the Constitution], the decision must depend not upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed." Shaffer

v. Carter, 252 U.S. 37, 55, 40 S.Ct. 221, 226, 64 L.Ed. 445, 458 (1920). Later in the same opinion, the court rejected an argument against the constitutionality of the tax commenting that the reasoning "errs in paying too much regard to theoretical distinctions, and too little to the practical effect and operation of the respective taxes as levied . . . ." Id. at 56, 40 S.Ct. at 227, 64 L.Ed. at 458. Accordingly, this court will weigh the commuters income tax in terms of its "practical operation and effect". Opinion of the Justices, 85 N.H. 572, 154 A. 633 (1931); Opinion of the Justices, 126 Me. 614, 137 A. 50 (1927).

[3,4] Since these plaintiffs pay no greater tax by reason of the New Hampshire tax than they otherwise would pay to Maine, they are not prejudiced by the commuters income tax. They are placed at no competitive disadvantages in New Hampshire which they would not be under without the tax, and they certainly are not deterred by the tax from entering the New Hampshire labor market. The tax thus does no violence to the privileges and immunities clause. The only burden on these plaintiffs is imposed by the withholding arrangement of New Hampshire as opposed to the quarterly payments of Maine, and the requirement of filing a New Hampshire return. The Supreme Court of the United States dealt with the argument that withholding the income of nonresidents at its source was an unconstitutional discrimination by saying that such a contention was "unsubstantial" and that the withholding "does not in any wise increase the burden of the tax

upon non-residents, but merely recognizes the fact that as to them the State imposes no personal liability and hence adopts a convenient substitute for it." Travis v. Yale Mfg. Co., 252 U.S. 60, 76, 40 S.Ct. 228, 230, 64 L.Ed. 460, 468. Likewise, the withholding and filing arrangements are necessary incidentals to administering the tax and do not create the "substantial difference" in treatment which would sustain plaintiffs' burden in proving the tax discriminatory to the point of being arbitrary and unreasonable. Wheeler v. State, 127 Vt. 361, 249 A.2d 887 (1969).

[5] Plaintiffs contend that the legislature has power only to levy taxes on "inhabitants of, and residents within, the said state" (N.H. Const. Pt. 2, Art. 5) and that it has therefore no power to levy an income tax on nonresidents. That article, however, together with Article 6, provides for the taxing of all estates and other classes of property. The tax imposed by RSA Ch. 77-B is a tax upon the receipt of property in the form of income in New Hampshire and is therefore within the power of the State. Opinion of the Justices, 99 N.H. 512, 112 A.2d 44 (1955); Opinion of the Justices, 111 N.H. 210, 212, 279 A.2d 741, 742 (1971).

A resident pays an unearned income tax, a $10 residence tax, and other taxes while the nonresident pays nothing for the state services which protect him and his employment unless by means of this tax which operates to produce a "practical equality" by means of the power

"to equitably defray the expense of protecting the right of property and other rights". Opinion of the Justices, 97 N.H. 546, 81 A.2d 853, 855 (1951). Because the tax is not discriminatory in its practical operation on these plaintiffs, the court holds it not violative of the privileges and immunity clause or the equal protective clause of the Federal Constitution or of the State constitution.

Declaratory judgment for the defendant.

All concurred.

APPENDIX C

THE STATE OF NEW HAMPSHIRE

Merrimack, SS.

Superior Court

Carl M. Austin,
Arthur W. Peverly and
Richard W. Logan

v.

The State of New Hampshire;
Lawton Chandler, William Conway,
and William Maynard, Tax Commissioners;
and Lawrence Blake, Director of the
Business Profits Division of the
New Hampshire Tax Commission

RESERVED CASE

This is a petition for declaratory judgment wherein the petitioners allege that the commuters income tax, RSA 77-B, to be in violation of the rights of the petitioners under the Constitution of the United States of America and the Constitution of the State of New Hampshire; and seek injunctive and other relief.

The defendant moved to dismiss, which motion was denied and defendant has seasonably excepted. It is agreed that the plaintiffs are residents in the State of Maine, employed in the State

of New Hampshire, and have paid the tax assessed by RSA 77-B in accordance with their tax returns copies of which are exhibits and are transferred with the record in accordance with the list of exhibits included herein.

All question of law raised by the within petition and the action of the Court on the motion to dismiss are reserved and transferred without ruling.

The pleadings, including all motions with the Court's action thereon and with a list of the exhibits transferred, are to be printed as an appendix.

Reserved and transferred.

September 20, 1972 — Charles J. Flynn
Charles J. Flynn

1970
STATE OF NEW HAMPSHIRE

• • • •

REVISED STATUTES ANNOTATED

• • • •

RSA

Chapter 77-B

Commuters Income Tax

(As enacted by Chapter 20, Laws of 1970, and amended by Chapter 57, Laws of 1970)

• • • •

RSA
Chapter 77-B

(as inserted by 1970, 20:1 and amended by 1970, 57)

Commuters Income Tax

77-B:1 Definitions. As used in this chapter the following terms shall have the following meanings unless the context clearly requires otherwise:

I. "Adjusted gross income" shall mean, for any taxable year, the adjusted gross income as defined in the United States internal revenue code in effect for that taxable year but excluding income which under the code is exempted from taxation by the state.

II. "Commission" shall mean the state tax commission.

III. "Estimated tax" shall mean the amount which the individual estimates as the amount of the income tax imposed by this chapter for the taxable year, minus the amount which the individual estimates as the sum of any credits against such tax.

IV. "Taxpayer" shall mean any person subject to the provisions of this chapter.

V. "Individual" shall mean a natural person.

VI. "New Hampshire taxable income" shall mean, for any taxable year, taxable income as defined under the United States internal revenue code in effect for that taxable year less any New Hampshire derived income, less an exemption of two thousand dollars and less any taxable business profits taxed pursuant to the business profits tax.

VII. "Person" shall mean any individual.

VIII. "Taxable year" shall mean the calendar or fiscal year, or portion thereof, upon the basis of which the New Hampshire tax is computed.

IX. "Taxable nonresident" shall mean any nonresident of the state whose adjusted gross income that taxable year includes any amount of New Hampshire derived income.

X. "New Hampshire derived income" shall mean, for any taxable year:

(a) rents, royalties and gain derived from the ownership of property within the state;

(b) wages, salaries, fees, commissions or other income received with respect to personal services performed of whatever kind and in whatever form paid derived from activities (1) performed within this state, or (2) performed from a base of operations within this state and not subject to an income tax within the state where the services are performed.

(c) income derived from every business, trade, occupation or profession of the taxpayer to the extent that the business, trade, occupation or profession is carried on within the state. But New Hampshire derived income shall not include any income excluded from adjusted gross income as defined in this section nor any taxable business profits taxed pursuant to the business profits tax.

XI. "Resident" shall mean:

(a) an individual domiciled in the state except one who maintains a permanent place of abode outside the state, does not maintain one within the state and does not spend more than thirty days of the taxable year within the state; or

(b) an individual who maintains a permanent place of abode within the state and spends more than one hundred eighty-three days of the taxable year within the state.

XII. For the purposes of this act, interest, dividends and capital gains received by the taxpayer from the ownership or sale of stock or from a beneficial interest in a trust and all income received by the taxpayer from a retirement system of any kind or from an annuity or other insurance plan shall be deemed to have been earned in the state of residence of said taxpayer.

77-B:2 Tax Imposed.

I. On Residents, Income Earned Outside New Hampshire. A tax is hereby imposed upon every resident of the state, which shall be levied, collected and paid annually at the rate of four percent of their income which is derived outside the state of New Hampshire as defined in RSA 77-B:1 "New Hampshire taxable income;" provided, however, that if such income shall be subject to a tax in the state in which it is derived, such tax shall constitute full satisfaction of the tax hereby imposed; and provided further, that if such income is exempt from taxation because of statutory or constitutional provisions in the state in which it is derived, or because the state in which it is derived does not impose an income tax on such income, it shall be exempt from taxation under this paragraph.

II. On Nonresidents, Income Earned in New Hampshire. A tax is hereby imposed upon every taxable nonresident, which shall be levied, collected and paid annually at the rate of four percent of their New Hampshire derived income as defined in RSA 77-B:1 less an exemption of two thousand dollars; provided, however, that if the tax hereby imposed exceeds the tax which would be imposed upon such income by the state of residence of the taxpayer, if such income were earned in such state, the tax hereby imposed shall be reduced to equal the tax which would be imposed by such other state.

III. Exception. Notwithstanding the provisions of paragraphs I and II, no tax shall be imposed upon salaries paid to men or women in the armed forces of the United States.

77-B:3 When Taxed. The tax imposed by RSA 77-B:2 shall be levied, collected, and paid by the fifteenth of the fourth month following the close of the taxable year.

77-B:4 Administration.

I. This chapter shall be administered and enforced by the business profits tax division of the tax commission subject to the supervision of the tax commission. The commission as authorized by governor and council, subject to personnel statutes, shall appoint such additional technical, cleri-

cal, and other personnel as the commission shall deem necessary to carry out the provisions of this chapter. The director of the business profits tax division shall have such powers, duties and functions in the enforcement of this chapter as the commission may from time to time assign. The director shall furnish a bond in an amount set under RSA 93.

II. Subject to the approval of the commission, the director may prescribe rules and regulations reasonably designed to carry into effect the intent and purpose of this chapter. These rules and regulations are prima facie evidence of its proper interpretations.

III. Subject to approval of the commission, the director is authorized to equip the division with furniture, equipment and supplies necessary to administer the division.

IV. The expenditures authorized by paragraphs I and III of this section shall be a charge against the moneys collected pursuant to this chapter, provided, however, that until such time as moneys received pursuant to this chapter equal the cost of administering the same, the expenditures shall be a charge against the general fund. The governor is authorized to draw his warrants from the sums so authorized out of any money in the treasury not otherwise appropriated.

77-B:5 Credit for Taxes Withheld. Income upon which any tax is required to be withheld at its source under RSA 77-B:10-16 shall be included in the return of the recipient of such income, but any amount of tax so withheld shall be credited against the amount of income tax as computed in such return.

77-B:6 Reciprocal Provisions. The commission is authorized to enter with any other state or country a reciprocal agreement in which such other state or country agrees not to impose a personal income tax upon income received by residents of this state and this state agrees not to impose a personal income tax upon income received by residents of such other state or country; provided, however, that such reciprocal agreement shall not become effective until the beginning of the next fiscal biennium after the date of such agreement.

Returns

77-B:7 Returns and Refunds of Individuals.

I. A taxpayer shall file a return of his net income for such a period and on such accounting basis as is authorized under the internal revenue code. For each taxable year, returns shall be made to the commission in such form and manner and to such extent as it shall prescribe by regulations, by the following taxpayers:

(a) A resident having for such taxable year any New Hampshire taxable income as defined in RSA 77-B:1; provided, however, that if it shall appear to the satisfaction of the commission that any residents of this state, or class of residents of this state, who are subject to the tax imposed by this act, are liable for tax upon the same income under the law imposed for the taxable year by another state and are thereby entitled to a credit allowed by section 2 of this chapter against the tax otherwise due under

this chapter, the commission shall by regulation relieve such residents or class of residents from being required to make any return under this chapter.

(b) A nonresident having for such taxable year New Hampshire derived income of two thousand dollars or more.

II. A husband and wife may make a single joint return to the commission for a taxable year for which such a return is filed under the laws of the United States. If the taxpayer if unable to make his own return, the return shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer.

III. Whenever a taxpayer shall file a return which shows that his withholding tax or estimated tax exceeds the amount of tax liability due under this chapter, he shall be due a refund and the tax commission shall forthwith certify the amount of said refund to the state treasurer who shall pay the same to the taxpayer; provided, however, that at the option of the taxpayer, said refund may be credited against any tax due from said taxpayer for the succeeding calendar year.

IV. Any refund or credit due a taxpayer pursuant to paragraph III for which said refund or credit is not requested within five years shall be deemed the property of the state of New Hampshire.

77-B:8 Information Returns. Each individual, partnership, corporation, joint stock company or association or insurance company, being a resident or having a place of business in this state, in whatever capacity acting, including lessees or mortgagors of personal property, fiduciaries, employers and all officers and employees of the state or of any political subdivision of the state, having the control, receipt, custody, disposal or payment of salaries, wages, rentals, or other compensation or income subject to the provisions of this chapter paid or payable during any year to any individual subject to a tax under this chapter shall on such date or dates as the commission shall from time to time designate, make complete return thereof to the commission.

77-B:9 Form and Verification of Returns. Returns shall be in such form as the commission may from time to time prescribe and shall be filed at any office which may be established on or before the fifteenth day of the fourth month following the close of the taxable year. In case of sickness, absence or other disability, or whenever good cause exists, the commission may allow further time for filing returns. Returns shall be verified by written declarations that the statements therein are made subject to the pains and penalties of perjury. When a return is made for a corporation or partnership, the person signing such return shall be deemed to be the person subject to the pains and penalties of perjury. The commission shall cause to be prepared blank forms for the returns and shall cause them to be distributed throughout the state and to be furnished upon application, but failure to receive or secure the form shall not relieve a taxpayer from the obligation of making the return herein required.

Withholding of Tax

77-B:10 Who Must Withhold. Every employer, as defined under the laws of the United States in effect April 26, 1947, with respect to income

tax collected at its source, employing any person liable for a tax pursuant to the provisions of this chapter shall deduct and withhold upon wages paid to said employee, a tax equal to four percent of such wages subject to the provisions of RSA 77-B:13.

77-B:11 Return of Withheld Taxes. Every employer required to deduct and withhold any tax under RSA 77-B:10 shall make return thereof to the commission on or before February fifteenth in each year and shall pay quarterly the tax withheld to the commission, provided, however, that the commission may, if such action is necessary in any emergency where collection of the tax may be in jeopardy, require such employer to make such return and pay such tax at any time, or from time to time.

77-B:12 Employer's Liability. Every employer required to deduct and withhold a tax under RSA 77-B:10 is hereby made liable for such tax and is hereby indemnified against the claims and demands of any individual, corporation or partnership for the amount of any payments made in accordance with the provisions of this chapter.

77-B:13 Use of Withholding Tables. At the election of the employer with respect to such employee, the employer may deduct and withhold upon the wages paid to such employee a tax determined on the basis of tables to be prepared and furnished by the commission, which tax shall be substantially equivalent to the tax provided in RSA 77-B:10 and which shall be in lieu of the tax required in such section.

77-B:14 Amount of Withheld Taxes as Lien Against Employer. If any employer required to deduct and withhold a tax under RSA 77-B:10 neglects or refuses to pay the same after demand, the amount, including interest after such demand, together with any costs that may accrue in addition thereto, shall be a lien in favor of the state of New Hampshire upon all property and rights to property, whether real or personal, belonging to such employer. Such lien shall arise at the time the assessment and demand is made by the commission and shall continue until the liability for such sum, with interest and costs, is satisfied or becomes unenforceable. Such lien shall be valid as against any subsequent mortgagee, pledgee, purchaser or judgment creditor when notice of such lien and the sum due has been filed by the commission with the clerk of the town or city in which the property subject to the lien is situated, or, in the case of an unorganized town or grant, in the office of the register of deeds for the county wherein such property is situated. In the case of any prior mortgage on real or personal property so written as to secure a present debt and also future advances by the mortgagee to the mortgagor, the lien herein provided, when notice thereof has been filed in the proper clerk's office, shall be subject to such prior mortgage unless the commission also notifies the mortgagee of the recording of such lien in writing, in which case any indebtedness thereafter created from mortgagor to mortgagee shall be junior to the lien herein provided for.

77-B:15 Release of Lien. The commission shall issue and record a certificate of release of the lien if:

I. The commission finds that the liability for the amount assessed and demanded, together with interest and costs, has been satisfied or has become unenforceable; or

II. There is furnished to the commission a bond with surety approved by the commission in a penal sum sufficient to equal the sum assessed and demanded, together with interest and costs, said bond to be conditioned upon the payment of any judgment rendered in proceedings regularly instituted by the commission to enforce collection thereof at law.

77-B:16 Foreclosure of Lien. The lien provided for by RSA 77-B:14 may be foreclosed in the case of real estate agreeably with the provisions of law relating to foreclosure of mortgages on real estate, and in the case of personal property, agreeably with the provisions of law relating to the foreclosure of chattel mortgages.

Estimated Tax Declarations

77-B:17 Who Must File.

I. Individuals liable for the tax assessed under this chapter shall annually on the fifteenth of the fourth month following the close of the taxable year furnish the tax commission with an estimate of income subject to taxation under this chapter for the current taxable year from which no New Hampshire withholding tax is expected to be made if such income can reasonably be expected to exceed ten thousand dollars.

II. The filing of estimates shall not be applicable to persons receiving their income from farming as defined under the United States code.

77-B:18 Payment of Estimated Tax. Each taxpayer required to file an estimated tax declaration shall include with his declaration of estimated income payment of not less than one-quarter of the tax due thereon. Thereafter, on the fifteenth days of the sixth and ninth months following the close of the taxable year the taxpayer shall pay not less than one-quarter of the tax due upon said estimated income or any revised estimate thereof.

77-B:19 Payment of Fourth Installment — General Rule. Annually on the fifteenth day following the close of the taxable year for which the estimate of income was made, the taxpayer, whose income can reasonably be expected to exceed his estimated income by thirty percent or more shall file an amended declaration of estimated income on or before such date and make payment in full of the balance of the tax due thereon, or in lieu thereof may file a return for the taxable year for which the estimate was made and pay the tax in full as computed on the return on or before the last day of the first month following the close of said taxable year. Otherwise, the final quarterly payment may be made with the taxpayer's return on the fifteenth day of the fourth month following the close of the taxable year for which the taxes were due.

77-B:20 — Exceptions. This requirement to amend or file a return shall not apply, however, if the taxpayer files a declaration of estimated income and makes payment of the tax due thereon as provided in this chapter, based upon:

I. The tax shown on the return by the taxpayer for the preceding taxable year, if a return showing a liability for tax was filed by the taxpayer for the preceding taxable year and such preceding year was a taxable year of twelve months, or

II. An amount equal to the tax computed at the rates applicable to the taxable year, on the basis of the taxpayer's status for the taxable year, but otherwise on the basis of the facts shown on his return for, and the law applicable to, the preceding taxable year.

77-B:21 Adjustments; Procedure. The commission is empowered to determine whether there has been error in the assessment of the tax imposed by this chapter, in accordance with the following provisions:

I. The taxpayer may demand such a determination, in writing, within three years after the tax was due or paid, whichever is later;

II. The commission may, on its own motion, undertake such a determination upon written notice to the taxpayer given within three years after the tax was due or paid, whichever is later.

III. After hearing, if requested by the taxpayer, the commission shall affirm or shall increase or decrease the tax theretofore assessed. Any increase ordered by the commission shall be assessed against the taxpayer and shall carry ten percent interest from the date originally due. Any decrease ordered by the commission shall, with ten percent interest from the date the tax was paid, be credited against any unpaid tax then due from the taxpayer and any balance due the taxpayer shall be certified to the state treasurer who shall pay the balance to the taxpayer, but such credit and payment together may not exceed the amount of the tax originally paid, plus interest.

77-B:22 Appeal. Within thirty days after notice of any adjustment of a tax by the commission under RSA 77-B:21, a taxpayer may appeal the commission's determination by petition to the superior court in the county where the taxpayer resides or, if not a resident, in the county where he has a place of business or a resident agent. The superior court shall determine the correctness of the commission's action de novo.

Miscellaneous Provisions

77-B:23 Penalty. Whoever violates any of the provisions of this chapter shall be fined not less than one hundred dollars nor more than two thousand dollars, or imprisoned not more than one year or both.

77-B:24 Disposal of Revenue. The revenue received from this tax, after paying the expense of administrating this chapter shall be paid into the general fund.

77-B:25 Investigation, etc.

I. The commission may take the oath of any person in the course of any hearing authorized by this chapter. In connection with hearings, the commission and taxpayer have the power to compel attendance of witnesses and the production of books, records, papers, vouchers, accounts or

other documents. The commission and taxpayer may take the depositions of witnesses residing within or without the state pertaining to a matter under this chapter, in the same way as depositions of witnesses are taken in civil actions in the superior court. Fees of witnesses are the same as those allowed to witnesses in the superior court and in the case of witnesses summoned by the commission shall be considered as an expense of administration of this chapter.

II. Any notice required by this chapter to be given by the commission to a taxpayer shall be made by certified mail to the last known address of the taxpayer and in the case of hearings shall be given at least ten days before the date thereof.

77-B:26 Confidentiality of Commission Records. Notwithstanding any other provision of law and except as hereinafter provided, the records and files of the commission respecting the administration of this chapter are confidential and privileged. The commission, and any employee engaged in the administration of this chapter or charged with the custody of any such records or files, shall not disclose any information obtained from the commission's records or files or from any examination, investigation or hearing authorized by this chapter. Neither the commission nor any employee of the commission may be required to produce any of the records, files and information for the inspection of any person or for use in any action or proceedings. The following exceptions apply to this section:

I. Testimony by a member or employee of the commission and production of records, files and information in behalf of the commission or a taxpayer in any action or proceeding under the provisions of this chapter where such testimony or the records or files or information, or the facts shown thereby are directly involved in the action or proceeding;

II. Delivery to a taxpayer or his duly authorized representative of a copy of any return or other paper filed by the taxpayer pursuant to this chapter;

III. Publication of statistics so classified as to prevent the identification of a particular return and the items of the return;

IV. Exchange of information with the United States internal revenue service in accordance with compacts made and provided for such cases;

V. Disclosure in confidence to the governor and council or their agent in the exercise of their general supervisory powers, or to any person authorized to audit the accounts of the commission in pursuance of such audit, or to the attorney general or other legal representative of the state in connection with an action or proceeding under this chapter.

77-B:27 Preference. The taxes and interest imposed by this chapter have preference in any distribution of the assets of the taxpayer, whether in insolvency or otherwise.

77-B:28 Dissolution of Corporations. No corporation organized under any law of this state may be dissolved until all taxes and interest required to be withheld by said corporation under this chapter have been fully paid.

The secretary of state shall not issue a certificate of dissolution, and no decree of dissolution shall be signed in any court without a certificate from the commission that no taxes and interest imposed by this chapter are due and unpaid.

[RSA 77-B:2 effective July 1, 1970, and remainder of Chapter 77-B effective May 4, 1970]

APPENDIX E

MAINE REVISED STATUTES ANNOTATED TITLE 36, PART 8

§ 5111. Imposition and rate of tax

A tax is hereby imposed for each taxable year on the entire taxable income of every resident individual of this State and on the taxable income of every nonresident individual which is derived from sources within this State. The amount of the tax shall be determined in accordance with the following table:

If the taxable income is:	The tax is:
Not over $2,000	1% of the taxable income
$2,000 but not over $5,000	$20 plus 2% of excess over $2,000
$5,000 but not over $10,000	$80 plus 3% of excess over $5,000
$10,000 but not over $25,000	$230 plus 4% of excess over $10,000
$25,000 but not over $50,000	$830 plus 5% of excess over $25,000
$50,000 or more	$2,080 plus 6% of excess over $50,000

§ 5127. Credit for income tax paid to another state

1. Resident individual. A resident

individual shall be allowed a credit against the tax otherwise due under this part for the amount of any income tax imposed on him for the taxable year by another state of the United States or a political subdivision thereof or the District of Columbia on income derived from sources therein and which is also subject to tax under this part.

2. Limitation on credit. The credit provided under this section shall not exceed the proportion of the tax otherwise due under this part that the amount of the taxpayer's adjusted gross income derived from sources in the other taxing jurisdiction bears to his entire adjusted gross income as modified by this part.

SEP 11 19
MICHAEL RODAK, JR

In The

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2060

CARL M. AUSTIN, et al., *Appellants,*

v.

STATE OF NEW HAMPSHIRE, et al., *Appellees*

On Appeal from the Supreme
Court of the State of New Hampshire

MOTION TO DISMISS

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On Appeal from the Supreme
Court of the State of New Hampshire

MOTION TO DISMISS

The Appellee moves the Court to dismiss the appeal herein on the ground that the questions presented are so unsubstantial as not to need further argument.

I.

STATEMENT

This case was brought by three residents of the State of Maine who were employed in the State of New Hampshire during the taxable year 1970. Pursuant to New Hampshire Revised Statutes Annotated [RSA] 77-B, their employers withheld from

their wages and salaries the amount of tax imposed upon their New Hampshire derived income as defined in RSA 77-B:1 (X).

The amount of tax so imposed by RSA 77-B:2 (II) was, under the provisions thereof, made equal to the amount of tax which would have been due the State of Maine under its income tax law had the income been earned in Maine.

Since the Maine tax law provides a credit against the Maine income tax for the amount of income subject to Maine tax which is also taxed by another jurisdiction, e.g., New Hampshire, the plaintiffs' tax-load was unaltered by the operation of RSA 77-B. Rather, that amount of tax was diverted to New Hampshire which would have been paid to Maine in the absence of the New Hampshire taxing statute.

The plaintiffs filed both New Hampshire and Maine tax returns for the year 1970. In December, 1971, the plaintiffs caused a petition for declaratory judgement to be filed. The defendant moved to dismiss, which motion was denied, exceptions noted, and all issues raised were transferred without ruling to the New Hampshire Supreme Court on September 20, 1972.

The New Hampshire Supreme Court issued a final judgement for the defendant declaring RSA 77-B to be not violative of either the privileges and immunities or due process clauses of the United States Constitution.

II.

ARGUMENT

The decision of the Supreme Court of New Hampshire is plainly correct. The case presented below by the appellants herein raises no constitutional issues not previously settled by this Court.

The taxation by a state of non-residents, *per se*, involves no violation of the privileges and immunities clause of the Federal Constitution. *Shaffer* v. *Carter*, 252 U.S. 37, 40 S. Ct. 221 (1920). In that case it was said:

> That a State, consistently with the Federal Constitution, may not prohibit the citizens of other States from carrying on legitimate business within its borders like its own citizens, of course is granted; but it does not follow that the business of non-residents may not be required to make a ratable contribution in taxes for the support of the government. On the contrary, the very fact that a citizen of one State has the right to hold property or carry on an occupation or business in another is a very reasonable ground for subjecting such non-resident, although not personally yet to the extent of his property held, or his occupation or business carried on therein, to a duty to pay taxes not more onerous in effect than those imposed under like circumstances upon citizens of the latter State.

The key phrase here is "not more onerous in effect. . . ." So long as the ultimate burden upon residents and non-residents is substantially unaltered by the incidence of the tax, there is no constitutional infirmity. As pointed out above, there is no substantial change in tax burden upon either residents or non-residents attributable to the operation of RSA 77-B. *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S. 60, 40 S. Ct. 228 (1920), relied upon by the appellants, is not compelling here. The New York income tax law under consideration in that case had the unavoidable effect of increasing the total tax burden of the non-residents to which it applied, since the neighboring States of New Jersey and Connecticut had no income tax in effect, and at the same time providing that that increase in tax burden should be greater for non-residents than for residents. The New York law was accordingly held to violate the privileges and immunities clause of the Federal Constitution. The balance of the opinion in *Travis* confirmed the principles enunciated in *Shaffer* v. *Carter*, *supra*, and added that the operation of a withholding provision for the collection of the tax was not a factor cognizable for purposes of determining constitutionality. *Travis* v. *Yale & Towne Mfg. Co.* does not support the appellants' contention that the New Hampshire Commuters Income Tax, which effects no increase in tax burden upon anyone,

resident or non-resident, violates the privileges and immunities clause; rather, as the New Hampshire Supreme Court noted in its opinion below, *Travis* confirms the fundamental principles of State taxing jurisdiction upon which RSA 77-B is grounded.

The due process clause of the Fourteenth Amendment provides no objection to the tax challenged herein. The only requirement of due process is that the tax imposed bear some fiscal relation to the protection, opportunities and benefits given by the state. *Wisconsin, et al* v. *J. C. Penney Co.*, 311 U.S. 435; 61 S. Ct. 246 (1940). Even multiple taxation of the same income by different states need not violate due process. *State Tax Commission of Utah* v. *Aldrich, et al*, 316 U.S. 174; 62 S. Ct. 1008 (1942). *Shaffer* v. *Carter, supra.*

The equal protection clause, in like manner, affords no grounds for attack upon RSA 77-B. The power to tax is an attribute of state sovereignty, and,

> Although the wide discretion as to classification retained by a legislature often results in narrow distinction, these distinctions, if reasonably related to the object of the legislation, are sufficient to justify the classification. *German Alliance Ins. Co.* v. *Lewis*, 233 U.S. 389, 418. 34 S. Ct. 612 (1914).

Furthermore, the practical, rather than the theoretical, effect is the standard by which tax statutes are to be measured.

> [t]he constitutional prohibition applies only to taxation which in fact bears unequally on persons or property of the same class and that mere differences in modes of assessment do not deny equal protection unless they are shown to produce such inequality. *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U.S. 232, 236. 10 S. Ct. 533 (1890).

As noted in the opinion below, the source of revenue reached by RSA 77-B is, for lack of personal jurisdiction over non-residents, the only source available from which to assess and effect the "ratable contribution in taxes for the support of the government." *Shaffer* v. *Carter, supra.*

Finally, in commenting upon the breadth of the power of states to make classifications for tax purposes, the Supreme Court in *Madden, Executor* v. *Kentucky*, 309 U.S. 83; 60 S. Ct. 406, (1940) said:

> . . . the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.

We submit that that burden has not been met by the appellants in this case, and that their appeal presents questions so unsubstantial as not to need further argument.

Respectfully submitted,

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September 5, 1974

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IN THE

Supreme Court of the United States

October Term 1974

No. 73-2060

CARL M. AUSTIN et al., Appellants,

v.

STATE OF NEW HAMPSHIRE et al., Appellees.

On Appeal from the Supreme
Court of the State of New Hampshire

BRIEF FOR THE APPELLANTS

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November 15, 1974

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IN THE

Supreme Court of the United States

October Term 1974

No. 73-2060

CARL M. AUSTIN et al., Appellants,

v.

STATE OF NEW HAMPSHIRE et al., Appellees.

On Appeal from the Supreme
Court of the State of New Hampshire

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the Supreme Court of the State of New Hampshire is reported in 316 A. 2d 165 as *Carl M. Austin et al. v. State Tax Commission*, Merrimack No. 6641.

JURISDICTION

The judgment of the Supreme Court of the State of New Hampshire was entered February 28, 1974 (App. p. 2). The notice of appeal to this court was filed in the Supreme Court of the State of New Hampshire on May 13, 1974 (App. p. 2). On May 20, 1974, by order of Mr. Justice Brennan, the time for docketing the appeal was extended to and included July 29, 1974. The appeal was docketed on July 22, 1974. On October 15, 1974 this Court entered the following order: "In this case probable jurisdiction is noted." The jurisdiction of this Court rests on 28 U.S.C. §1257(2).

QUESTIONS PRESENTED

1. Whether a New Hampshire statute which taxes income of nonresidents earned in New Hampshire but which does not tax income of residents earned in New Hampshire violates the Privileges and Immunities Clause of Article IV §2 of the United States Constitution?

2. Whether a New Hampshire statute which taxes income of nonresidents earned in New Hampshire but which does not tax income of residents earned in New Hampshire violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

STATUTE INVOLVED

Ch. 77-B of the New Hampshire Revised Statutes Annotated,[1] known as the New Hampshire Commuters

[1] Amendments to Ch. 77-B of the New Hampshire Revised Statutes Annotated not affecting the substantial questions presented to this Court were enacted by C. 528 of the 1973 Public Laws of New Hampshire, effective October 31, 1973 and C. 544 of the 1973 Public Laws of New Hampshire, effective September 1, 1973. See the 1973 Cumulative Supplement to Vol. 1-A of the New Hampshire Revised Statutes Annotated, pp. 107-108.

Income Tax, is the New Hampshire statute construed by the Supreme Court of New Hampshire as not violative of the privileges and immunities and equal protection clauses of the United States Constitution. Ch. 77-B of the New Hampshire Revised Statutes is the statute involved in this case and is set forth in the appendix to the brief (statutory appendix pp. 20-33). Section 2 of Ch. 77-B is the provision of the New Hampshire Commuters Income Tax imposing the tax and reads as follows:

77-B:2 Tax Imposed.

I. On Residents, Income Earned Outside New Hampshire. A tax is hereby imposed upon every resident of the state, which shall be levied, collected and paid annually at the rate of four percent of their income which is derived outside the state of New Hampshire as defined in RSA 77-B:1 "New Hampshire taxable income;" provided, however, that if such income shall be subject to a tax in the state in which it is derived, such tax shall constitute full satisfaction of the tax hereby imposed; and provided further, that if such income is exempt from taxation because of statutory or constitutional provisions in the state in which it is derived, or because the state in which it is derived does not impose an income tax on such income, it shall be exempt from taxation under this paragraph.

II. On Nonresidents, Income Earned in New Hampshire. A tax is hereby imposed upon every taxable nonresident, which shall be levied, collected and paid annually at the rate of four percent of their New Hampshire derived income as defined in RSA 77-B:1 less an exemption of two thousand dollars; provided, however, that if the tax hereby imposed exceeds the tax which would be imposed upon such income by the state of residence of the taxpayer, if such income were earned in such state, the tax hereby imposed shall be reduced to equal the tax which would be imposed by such other state.

III. Exception. Notwithstanding the provisions of paragraphs I and II, no tax shall be imposed upon salaries paid to men or women in the armed forces of the United States.

STATEMENT

Appellants are residents of the State of Maine who during the taxable year 1970 earned income in the State of New Hampshire. A tax was imposed by the State of New Hampshire on the appellants' income earned in New Hampshire under the authority of the N.H. RSA, Ch. 77-B:2 II (statutory appendix p. 22). The tax imposed in 1970 was withheld from appellants' wages by their employers pursuant to the N.H. RSA Ch. 77-B:10 (statutory appendix p. 26).

Appellants paid the tax imposed by the State of New Hampshire and received a credit from the State of Maine for the New Hampshire tax paid. The State of Maine imposed a tax on the entire taxable income of residents and the income of nonresidents derived from sources within Maine. 36 M.R.S.A. §5111 (statutory appendix p. 33). The State of Maine gives a credit to residents for taxes paid other jurisdictions. 36 M.R.S.A. §5127 (statutory appendix p. 34).

Appellants brought a petition for declaratory judgment on behalf of themselves and other taxpayers similarly situated before the New Hampshire Superior Court for Merrimack County, challenging the constitutionality of the New Hampshire Commuters Income Tax under the Constitution of the United States and the Constitution of the State of New Hampshire. The appellees brought a motion to dismiss, which was denied. Exceptions were noted by the Superior Court and all issues were transferred to the New Hampshire Supreme Court (App. p. 5).

The New Hampshire Supreme Court held the appellants had standing to challenge the tax imposed. *Austin et al, v. State Tax Commission*, 316 A. 2d 165, 166.

The Court went on to hold the tax imposed was "not violative of the privileges and immunity clause or the equal protective [sic] clause of the Federal Constitution or of the State Constitution." *Id.* at 167, 168.

SUMMARY OF ARGUMENT

The New Hampshire Commuters Income Tax Law, N.H. RSA Ch. 77-B, imposes a tax on Maine residents and other nonresidents of New Hampshire on income earned in New Hampshire. The amount of tax paid by a nonresident is dependent in part on the taxing structure of his state of residence.

The New Hampshire Commuters Income Tax Law does not impose a tax on New Hampshire residents on income earned in New Hampshire. The statute purports to tax income of New Hampshire residents earned in other jurisdictions. No tax is ever paid, under this statute, by a New Hampshire resident to the State of New Hampshire on income earned in other jurisdictions.

This statute, imposing a tax on Maine residents and other nonresidents of New Hampshire, denies to them a privilege and immunity granted to citizens of all states by Article IV, Section 2 of the United States Constitution and equal protection of the laws granted to all persons within a state's jurisdiction by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The privileges and immunities clause precludes the imposition of higher taxes upon citizens of other states than the taxes imposed by the taxing state upon its own citizens. The equal protection clause denies a state the power to legislate so that different treatment is accorded to persons placed by statute into different classes on the basis of criteria not related to the objective of the statute.

ARGUMENT

I

THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV SECTION 2 OF THE UNITED STATES CONSTITUTION IS VIOLATED BY THE NEW HAMPSHIRE COMMUTERS INCOME TAX LAW FOR THAT STATUTE FAILS TO IMPOSE A TAX ON NEW HAMPSHIRE RESIDENTS ON THEIR NEW HAMPSHIRE DERIVED INCOME WHILE IMPOSING A TAX ON NONRESIDENTS OF NEW HAMPSHIRE ON THEIR NEW HAMPSHIRE DERIVED INCOME.

The purpose of the privileges and immunities clause of Article IV Section 2 of the United States Constitution is well stated by former Chief Justice Vinson.

> "The primary purpose . . . was to fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948).

Among the privileges and immunities granted to a citizen who passes into another State is the privilege and immunity,

> ". . . to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens." *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 420 (1870).

Tax liability under the New Hampshire Commuters Income Tax, N.H. RSA Ch. 77-B, depends on whether or not one is a resident of the State of New Hampshire. If one is a resident of New Hampshire he will never pay a tax under the provisions of the New Hampshire Commuters Income Tax. The statute contains no provision for a tax on income earned in New Hampshire by New Hampshire residents.

The New Hampshire Commuters Income Tax does purport to levy a tax on the New Hampshire resident on income derived outside of New Hampshire as follows:

> "A tax is hereby imposed upon every resident of the state, which shall be levied, collected and paid annually at the rate of four percent of their income which is derived outside the state of New Hampshire as defined in RSA 77-B:1 'New Hampshire taxable income;' provided, however, that if such income shall be subject to a tax in the state in which it is derived, such tax shall constitute full satisfaction of the tax hereby imposed; and provided further, that if such income is exempt from taxation because of statutory or constitutional provisions in the state in which it is derived, or because the state in which it is derived does not impose an income tax on such income, it shall be exempt from taxation under this paragraph." RSA 77-B:2 I.

Effectively a New Hampshire resident never pays a tax to the State of New Hampshire under 77-B:2 I. If the jurisdiction in which the New Hampshire resident earns income does not impose a tax on such income, the income is specifically exempted from tax by the express provision of 77-B:2 I. If the New Hampshire resident is subject to a tax levied by another state on income derived in that state by the New Hampshire resident, the payment of the tax to the other state by the New Hampshire resident is full satisfaction of the tax imposed by New Hampshire on its resident pursuant to 77-B:2 I. It is submitted that there is no real imposition of a tax by the State of New Hampshire on its residents under 77-B:2 I.

Should one conclude that New Hampshire residents are taxed by New Hampshire under N.H. RSA 77-B:2 I even though payment is never made to the State of

New Hampshire, the amount of tax would vary depending on the tax structure of the jurisdiction from which the New Hampshire resident derived income. Thus, even as between New Hampshire residents there is discrimination if one accepts the premise that a tax is effectively levied on New Hampshire residents.

The portion of the New Hampshire Commuters Income Tax Law that imposes the tax on nonresidents reads as follows:

> "A tax is hereby imposed upon every taxable nonresident, which shall be levied, collected and paid annually at the rate of four percent of their New Hampshire derived income as defined in RSA 77-B:1 less an exemption of two thousand dollars; provided, however, that if the tax hereby imposed exceeds the tax which would be imposed upon such income by the state of residence of the taxpayer, if such income were earned in such state, the tax hereby imposed shall be reduced to equal the tax which would be imposed by such other state." N.H. RSA 77-B:2 II.

An analysis of this statutory provision reveals that New Hampshire imposes a four percent tax on New Hampshire derived income of nonresidents after an exemption of two thousand dollars. The four percent rate applies, however, only if the tax imposed "exceeds the tax which would be imposed upon such income by the state of residence of the taxpayer, if such income were earned in such state..." 77-B:2 II. When this occurs, "the tax... imposed shall be reduced to equal the tax which would be imposed by such other state." 77-B:2 II. Thus, the taxing structure of the nonresident's state of residence determines the effective New Hampshire tax. Under the language of the New Hampshire statute as written, when there is no income tax in the nonresident's state of residence, the effective tax is at the maximum rate of four percent of the New

Hampshire derived income less the two thousand dollar exemption. When, however, the nonresident's state of residence imposes a lesser tax on income derived in that state, the tax imposed by New Hampshire is reduced to equal the tax which would have been imposed by the nonresident's state of residence if the nonresident had earned the income in his state of residence. As a practical matter it would appear from the New Hampshire Income Tax Form at line six (App. p. 6), that no tax is imposed on a nonresident residing in a jurisdiction without an income tax.

In contrast to the New Hampshire resident working in New Hampshire who never pays a tax, a Maine resident or a resident of Massachusetts or Vermont or any other nonresident of New Hampshire working alongside the New Hampshire resident, with the same earnings, marital status and number of dependents would pay the tax imposed by N.H. RSA 77-B:2 II. Even as among the residents of Maine, Massachusetts and Vermont and other nonresidents of New Hampshire with the same earnings, marital status and number of dependents, the tax imposed by N.H. RSA 77-B:2 II can differ in amount and is discriminatory.

Using rationale from *Shaffer v. Carter*, 252 U.S. 37, 55, 56, the New Hampshire Supreme Court, in the opinion below, determined that it

> "... will weigh the commuters income tax in terms of its practical effect and operation. citations omitted" *Carl M. Austin et al. v. State Tax Commission*, 316 A. 2d 165, 167 (1974).

The Maine taxpayers are in complete agreement with the New Hampshire Supreme Court's expressed desire to weigh the tax in terms of its practical effect and operation. There is no showing, however, that the tax structure of the State of New Hampshire is such that there is practical equality between residents and

nonresidents nor, appellants submit, can the State of New Hampshire show such practical equality. Lack of discrimination against nonresidents cannot be assumed. *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 81 (1920). Validity of a tax cannot be established by its mere imposition. *Mullaney v. Anderson*, 342 U.S. 415, 418 (1952). This court consistently gives a narrow scope of operation to the presumption of constitutionality when legislation appears on its face to violate a specific prohibition of the constitution. *Ex Parte Endo*, 323 U.S. 283, 299 (1944).

The New Hampshire Supreme Court states in the opinion below that:

> "A resident pays an unearned income tax, a ten dollar residence tax, and other taxes while a nonresident pays nothing for the state services which protects him and his employment unless by means of this tax which operates to produce a 'practical equality' by means of the power 'to equitably defray the expense of protecting the right of property and other rights.'" *Carl M. Austin et al. v. State Tax Commission*, 316, A. 2d 165, 167 (1974).

A New Hampshire resident does pay a ten dollar resident tax, N.H. RSA 72:1 (statutory appendix p. 35), which is a flat annual charge, and is retained for the use of the town and city in which collected. N.H. RSA 72:5-a (Supp.-1973) (statutory appendix p. 35). The other named tax indicated in the opinion below to apply to residents and not nonresidents is the unearned income tax. This unearned income tax N.H. RSA 77:1 (statutory appendix p. 35) applies to interest and dividends of resident individuals and not to nonresident individuals, N.H. RSA 77:3-4 (statutory appendix pp. 35, 36), and under its terms, six hundred dollars of income otherwise taxable is exempt. N.H. RSA 77:5 (statutory appendix p. 36). No other taxes imposed

by New Hampshire are specifically named by the New Hampshire Supreme Court to apply to residents and not to nonresidents; nor have the Maine taxpayers found any other such taxes. There are, however, taxes imposed by the State of New Hampshire such as the business profits tax, the real estate transfer tax, the tobacco tax and taxes on real and personal property, which apply to nonresidents as well as residents. The Maine taxpayers submit that a ten dollar annual fee, returnable to the use of cities and towns and a four and one quarter percent tax on unearned income with a six hundred dollar annual exemption is not practically equivalent to a tax on their earnings.

Even if one could conclude that the taxes on certain nonresident taxpayers were practically equivalent to taxes on New Hampshire residents, there would be discrimination by the State of New Hampshire among the nonresident taxpayers unless taxes among nonresident taxpayers from different states were levied at the same rate. N.H. RSA 77-B:2 II clearly indicates that the tax structure of the nonresident's state of residence can dictate the amount of tax paid to the State of New Hampshire. Uniformity in the tax structures of all tax jurisdictions does not exist.

The practical operation of the New Hampshire Commuters Income Tax Law is not to tax residents of New Hampshire but to impose a tax on nonresidents earning income in New Hampshire. The amount of tax paid by nonresidents with the same earnings, marital status and dependents often varies because of the tax structure of the nonresident's state of residence. In *Toomer v. Witsell*, 342 U.S. 385 (1948), the State of South Carolina attempted to impose higher license taxes on nonresidents who caught shrimp off the coast of South Carolina than that imposed upon South Carolina shrimp fishermen. The Court held that the South Carolina statute violated Article IV §2 of the United States Constitution (the privileges and immunities clause). In addition, the South Carolina statute was also

held to be in violation of the commerce clause Art. 1 §8 of the United States Constitution. The *Toomer* case differs from the instant case in that the South Carolina statute held to be unconstitutional did impose a license tax upon its own residents albeit one hundred times less than the license tax upon the nonresidents. Of like import is *Mullaney v. Anderson*, 342 U.S. 415 (1952), where a statute enacted by the Territorial Legislature of Alaska imposing a five dollar license fee on resident fishermen and a fifty dollar license fee on nonresident fishermen was held to be in violation of the Privileges and Immunities Clause of Article IV, §2 of the United States Constitution. The New Hampshire Commuters Income Tax, N.H. RSA Ch. 77-B, imposes no tax on New Hampshire residents deriving income in New Hampshire while imposing a tax of four percent of New Hampshire derived income with certain limitations upon nonresidents.

The United States Supreme Court invalidated those portions of the general income tax law of the State of New York which permitted residents greater personal exemptions than those granted nonresidents. Justice Pitney speaking for the court said:

> "In the concrete, the particular incidence of the discrimination is upon citizens of Connecticut and New Jersey, neither of which States has an income tax law. A considerable number of complainant's employees, residents and citizens of one or the other of those States, spend their working time at its office in the city of New York, and earn their salaries there. The case is typical; it being a matter of common knowledge that from necessity due to the geographical situation of that city, in close proximity to the neighboring States, many thousands of men and women, residents and citizens of those States, go daily from their homes to the city and earn their livelihood there. They pursue their several occupa-

tions side by side with residents of the State of New York — in effect competing with them as to wages, salaries, and other terms of employment. Whether they must pay a tax upon the first one thousand or two thousand dollars of income, while their associates and competitors who reside in New York do not, makes a substantial difference. Under the circumstances as disclosed, we are unable to find adequate ground for the discrimination, and are constrained to hold that it is an unwarranted denial to the citizens of Connecticut and New Jersey of the privileges and immunities enjoyed by citizens of New York. This is not a case of occasional or accidental inequality due to circumstances personal to the taxpayer (see *Amoskeag Savings Bank v. Purdy*, 231 U.S. 373, 393-394; *Maxwell v. Bugbee*, 250 U.S. 525, 543); but a general rule, operating to the disadvantage of all nonresidents including those who are citizens of the neighboring States, and favoring all residents including those who are citizens of the taxing State." *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 80-81 (1920).

The instant case differs from the *Travis* case in that in the case before this court no income tax is levied upon New Hampshire residents working in New Hampshire while in the *Travis* case an income tax was levied upon residents of the State of New York. However, the rationale of the *Travis* case as to violation of privileges and immunities of nonresidents applies to the instant case. Also see *State ex rel. Haworth v. Berntsen et ux.*, 200 P. 2d 1007 (Idaho 1948). For in both the *Travis* case and this case a discrimination against nonresidents exists. In the instant case the Maine residents contend the discrimination is even more severe in that no tax is levied upon New Hampshire residents working in New Hampshire.

II

THE NEW HAMPSHIRE COMMUTERS INCOME TAX LAW VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AS THAT STATUTE ESTABLISHES A CLASSIFICATION FOR TAX PURPOSES WHICH INVIDIOUSLY DISCRIMINATES AGAINST ALL NEW HAMPSHIRE NONRESIDENTS DERIVING INCOME IN NEW HAMPSHIRE.

States may treat different classes of persons in different ways without violating the Equal Protection Clause of the Fourteenth Amendment of the United States. *Reed v. Reed*, 404 U.S. 71, 75 (1971). This power to classify is of wide range and flexibility. *Louisville Gas Co. v. Coleman*, 277 U.S. 32, 37 (1928). Nevertheless a tax which results in arbitrary discrimination in classification denies the equal protection of the law guaranteed by the Fourteenth Amendment of the United States Constitution, for the United States Supreme Court has stated:

> "...the classification must be reasonable and not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1919).

Mr. Justice Douglas has indicated a limitation on the prohibition of the Equal Protection Clause as going "...no further than the invidious discrimination." *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

In determining whether a classification is so arbitrary as to result in invidious discrimination, a class must be found upon which the discrimination is practiced. There are many classes which have been dis-

criminated against in violation of the Equal Protection Clause of the Fourteenth Amendment. Among the classes which have been found to have been discriminated against in violation of the Equal Protection Clause are the following: the criminal insane, *Baxstrom v. Herold*, 383 U.S. 107 (1966); voters, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); prisoners, *Rinaldi v. Yeager*, 384 U.S. 305 (1966); needy persons, *Shapiro v. Thompson*, 394 U.S. 618 (1969); women, *Reed v. Reed*, 404 U.S. 71 (1971); unmarried persons, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); illegitimate children, *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); indigent defendants, *James v. Strange*, 407 U.S. 128 (1972); primary voters, *Kusper v. Pontikes*, 414 U.S. 51 (1973).

Under the New Hampshire Commuters Income Tax Law, N.H. RSA 77-B:2 II, nonresidents of New Hampshire are subject to a tax on their New Hampshire derived income while residents of New Hampshire are not subject to a tax on their New Hampshire derived income. Discrimination against nonresident property taxpayers has been held to be in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. *Bivens et al. v. Board of Com'rs of Wabaunsee County, Kansas*, 66 F. 2d 35 (1933).

Even among nonresidents as a class, there are subclasses composed of residents from each state deriving income from New Hampshire. For example, Massachusetts, Vermont and Maine residents deriving income from New Hampshire would each be a separate subclass. The amount of tax that a member of each of these subclasses of nonresidents would pay under the provisions of the New Hampshire Commuters Income Tax Law to the State of New Hampshire is dependent in part on the tax structures of Massachusetts, Vermont and Maine. This is so because the New Hampshire Commuters Income Tax Law provides:

> "A tax is hereby imposed upon every taxable nonresident, which shall be levied, collected and paid annually at the rate of four percent of their New Hampshire derived income as defined in R.S.A. 77-B:1 less an exemption of two thousand dollars; **provided, however, that if the tax hereby imposed exceeds the tax which would be imposed upon such income by the state of residence of the taxpayer, if such income were earned in such state, the tax hereby imposed shall be reduced to equal the tax which would be imposed by such other state.**" N.H. RSA 77-B:2 II (emphasis supplied).

The tax structures of the several states whose residents work in New Hampshire are not identical. Therefore, the amount of tax paid to New Hampshire by New Hampshire nonresidents from different states, can and often does vary even though they may earn the same amount of New Hampshire derived income and have the same number of dependents and the same marital status.

The legislative object of the New Hampshire Commuters Income Tax Law is to raise revenue to fund New Hampshire's services. The law provides that, "The revenue received from this chapter after paying the expense of administering this chapter shall be paid into the general fund." N.H. RSA 77-B:24. The classifications created by the New Hampshire Commuters Income Tax Law do not rest upon a ground of difference having a substantial relation to the object of the legislation. The Maine taxpayers submit that the New Hampshire Commuters Income Tax Law results in invidious discrimination against nonresidents of New Hampshire subject to that statute. A fundamental principle involved in classification is that it must meet the requirement that a law shall affect alike all persons in the same class and under similar conditions. *Duncan v. Missouri*, 152 U.S. 377, 382 (1893).

The judgment of a California Superior Court striking down an ordinance of the city and county of San Francisco that imposed a fee of one percent of adjusted gross income of all persons who were employed in the city and county but who resided elsewhere, was affirmed by the Court of Appeals of California, First District. *County of Alameda et al. v. City and County of San Francisco*, 19 Cal. App. 3d 750, 97 Cal. Rptr. 175, 48 ALR 3d, 332. The California Court of Appeals held, inter alia, that although a city might have justification for allocating certain costs to nonresidents, "... the city may not accomplish this end by imposing a tax solely upon nonresidents engaged in a particular activity while totally exempting residents engaged in the same activity." *Id.* at 341. The California Court of Appeals in concluding that the ordinance denied equal protection of the law to the nonresidents commented, "aside from its constitutional infirmities, the San Francisco ordinance is by its very nature likely to court a situation where retaliatory measures are enacted by neighboring cities and the state is divided into numerous warring economic units, all to the disadvantage of the individual citizen." *Id.* at 341.

The New Hampshire Commuters Income Tax Law does create an atmosphere whereby neighboring states could think in terms of retaliatory measures against New Hampshire residents. The United States Supreme Court has clearly indicated that discrimination is not to "... be corrected by retaliation; to prevent this was one of the chief ends sought to be accomplished by the adoption of the Constitution." *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 82 (1920). The Maine taxpayers urge this court to eliminate any possibility of retaliation measures by declaring the New Hampshire Commuters Income Tax Law provision imposing a tax on them to be in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

III

MAINE RESIDENTS DERIVING INCOME IN NEW HAMPSHIRE AND PAYING A TAX TO THE STATE OF NEW HAMPSHIRE PURSUANT TO THE PROVISIONS OF THE NEW HAMPSHIRE COMMUTERS INCOME TAX LAW ARE INJURED IN FACT BY THE IMPOSITION AND PAYMENT OF THAT TAX.

Although Maine residents deriving income in New Hampshire, are not immediately paying out more tax dollars, they are injured in fact. Taxpayers have standing to pursue a constitutional claim of denial of equal protection of the law. *Allied Stores of Ohio, Inc. v. Bowers, Tax Commissioner of Ohio*, 358 U.S. 522, 526 (1959). It is true the Maine residents receive a credit from the State of Maine for Commuters Income Tax paid the State of New Hampshire (statutory appendix p. 34), but appellants strenuously disagree with the following statement of the New Hampshire Supreme Court:

> "Since these plaintiffs pay no greater tax by reason of the New Hampshire tax than they would otherwise pay to Maine, they are not prejudiced by the Commuters Income Tax." *Austin et al. v. State Tax Commission*, 316 A. 2d 165, 167 (1974).

The services provided by the State of New Hampshire to nonresidents and residents for which nonresidents are paying tax dollars under N.H. RSA Ch. 77-B, are not being paid for on a proportional basis by residents under N.H. RSA Ch. 77-B. In fact no tax dollars are being paid under N.H. RSA Ch. 77-B by New Hampshire residents to provide these services. If New Hampshire residents were taxed on New Hampshire derived income under N.H. RSA Ch. 77-B at the same rate as Maine residents, there would be more tax dollars to provide additional services in New Hampshire

to residents and nonresidents. On the other hand, if services paid for by taxes under N.H. RSA Ch. 77-B were to remain at the same level and the residents shared the tax burden with appellants under N.H. RSA Ch. 77-B, the appellants would be paying a lower tax. Appellants are injured as residents of New Hampshire are not sharing the tax burden under N.H. RSA Ch. 77-B.

Maine residents do not object to paying tax dollars to the State of New Hampshire provided New Hampshire residents pay tax dollars on the same basis. However, when tax dollars are not paid on the same basis by residents and nonresidents, as in the instant case, the Maine residents are suffering a very real injury. Tax dollars are being collected and diverted from the appellants' domiciliary state under a law which violates the privileges and immunities clause of the United States Constitution as well as the equal protection clause.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

November 15, 1974

CHARLES W. SMITH
Counsel for the Appellants

STATUTORY APPENDIX

NEW HAMPSHIRE

RSA

Chapter 77-B

(as enacted by Chapter 20, Laws of 1970 and amended by Chapter 57, Laws of 1970)

Commuters Income Tax

77-B:1 Definitions. As used in this chapter the following terms shall have the following meanings unless the context clearly requires otherwise:

I. "Adjusted gross income" shall mean, for any taxable year, the adjusted gross income as defined in the United States internal revenue code in effect for that taxable year but excluding income which under the code is exempted from taxation by the state.

II. "Commission" shall mean the state tax commission.

III. "Estimated tax" shall mean the amount which the individual estimates as the amount of the income tax imposed by this chapter for the taxable year, minus the amount which the individual estimates as the sum of any credits against such tax.

IV. "Taxpayer" shall mean any person subject to the provisions of this chapter.

V. "Individual" shall mean a natural person.

VI. "New Hampshire taxable income" shall mean, for any taxable year, taxable income as defined under the United States internal revenue code in effect for that taxable year less any New Hampshire derived income, less an exemption of two thousand dollars and less any taxable business profits taxed pursuant to the business profits tax.

VII. "Person" shall mean any individual.

VIII. "Taxable year" shall mean the calendar or fiscal year, or portion thereof, upon the basis of which the New Hampshire tax is computed.

IX. "Taxable nonresident" shall mean any nonresident of the state whose adjusted gross income that taxable year includes any amount of New Hampshire derived income.

X. "New Hampshire derived income" shall mean, for any taxable year:

(a) rents, royalties and gain derived from the ownership of property within the state;

(b) wages, salaries, fees, commissions or other income received with respect to personal services performed of whatever kind and in whatever form paid derived from activities (1) performed within this state, or (2) performed from a base of operations within this state and not subject to an income tax within the state where the services are performed.

(c) income derived from every business, trade, occupation or profession of the taxpayer to the extent that the business, trade, occupation or profession is carried on within the state. But New Hampshire derived income shall not include any income excluded from adjusted gross income as defined in this section nor any taxable business profits taxed pursuant to the business profits tax.

XI. "Resident" shall mean:

(a) an individual domiciled in the state except one who maintains a permanent place of abode outside the state, does not maintain one within the state and does not spend more than thirty days of the taxable year within the state; or

(b) an individual who maintains a permanent place of abode within the state and spends more than one

nundred eighty-three days of the taxable year within the state.

XII. For the purposes of this act, interest, dividends and capital gains received by the taxpayer from the ownership or sale of stock or from a beneficial interest in a trust and all income received by the taxpayer from a retirement system of any kind or from an annuity or other insurance plan shall be deemed to have been earned in the state of residence of said taxpayer.

77-B:2 Tax Imposed.

I. On Residents, Income Earned Outside New Hampshire. A tax is hereby imposed upon every resident of the state, which shall be levied, collected and paid annually at the rate of four percent of their income which is derived outside the state of New Hampshire as defined in RSA 77-B:1 "New Hampshire taxable income;" provided, however, that if such income shall be subject to a tax in the state in which it is derived, such tax shall constitute full satisfaction of the tax hereby imposed; and provided further, that if such income is exempt from taxation because of statutory or constitutional provisions in the state in which it is derived, or because the state in which it is derived does not impose an income tax on such income, it shall be exempt from taxation under this paragraph.

II. On Nonresidents, Income Earned in New Hampshire. A tax is hereby imposed upon every taxable nonresident, which shall be levied, collected and paid annually at the rate of four percent of their New Hampshire derived income as defined in RSA 77-B:1 less an exemption of two thousand dollars; provided, however, that if the tax hereby imposed exceeds the tax which would be imposed upon such income by the state of residence of the taxpayer, if such income were earned in such state, the tax hereby imposed shall be reduced to equal the tax which would be imposed by such other state.

III. Exception. Notwithstanding the provisions of paragraphs I and II, no tax shall be imposed upon salaries paid to men or women in the armed forces of the United States.

77-B:3 When Taxed. The tax imposed by RSA 77-B:2 shall be levied, collected, and paid by the fifteenth of the fourth month following the close of the taxable year.

77-B:4 Administration.

I. This chapter shall be administered and enforced by the business profits tax division of the tax commission subject to the supervision of the tax commission. The commission as authorized by governor and council, subject to personnel statutes, shall appoint such additional technical, clerical, and other personnel as the commission shall deem necessary to carry out the provisions of this chapter. The director of the business profits tax division shall have such powers, duties and functions in the enforcement of this chapter as the commission may from time to time assign. The director shall furnish a bond in an amount set under RSA 93.

II. Subject to the approval of the commission, the director may prescribe rules and regulations reasonably designed to carry into effect the intent and purpose of this chapter. These rules and regulations are prima facie evidence of its proper interpretations.

III. Subject to approval of the commission, the director is authorized to equip the division with furniture, equipment and supplies necessary to administer the division.

IV. The expenditures authorized by paragraphs I and III of this section shall be a charge against the moneys collected pursuant to this chapter, provided, however, that until such time as moneys received pursuant to this chapter equal the cost of administering

the same, the expenditures shall be a charge against the general fund. The governor is authorized to draw his warrants from the sums so authorized out of any money in the treasury not otherwise appropriated.

77-B:5 Credit for Taxes Withheld. Income upon which any tax is required to be withheld at its source under RSA 77-B:10-16 shall be included in the return of the recipient of such income, but any amount of tax so withheld shall be credited against the amount of income tax as computed in such return.

77-B:6 Reciprocal Provisions. The commission is authorized to enter with any other state or country a reciprocal agreement in which such other state or country agrees not to impose a personal income tax upon income received by residents of this state and this state agrees not to impose a personal income tax upon income received by residents of such other state or country; provided, however, that such reciprocal agreement shall not become effective until the beginning of the next fiscal biennium after the date of such agreement.

Returns

77-B:7 Returns and Refunds of Individuals.

I. A taxpayer shall file a return of his net income for such a period and on such accounting basis as is authorized under the internal revenue code. For each taxable year, returns shall be made to the commission in such form and manner and to such extent as it shall prescribe by regulations, by the following taxpayers:

(a) A resident having for such taxable year any New Hampshire taxable income as defined in RSA 77-B:1; provided, however, that if it shall appear to the satisfaction of the commission that any residents of this state, or class of residents of this state, who are subject to the tax imposed by this act, are liable for tax upon the same income under the law imposed for

the taxable year by another state and are thereby entitled to a credit allowed by section 2 of this chapter against the tax otherwise due under this chapter, the commission shall by regulation relieve such residents or class of residents from being required to make any return under this chapter.

(b) A nonresident having for such taxable year New Hampshire derived income of two thousand dollars or more.

II. A husband and wife may make a single joint return to the commission for a taxable year for which such a return is filed under the laws of the United States. If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer.

III. Whenever a taxpayer shall file a return which shows that his withholding tax or estimated tax exceeds the amount of tax liability due under this chapter, he shall be due a refund and the tax commission shall forthwith certify the amount of said refund to the state treasurer who shall pay the same to the taxpayer; provided, however, that at the option of the taxpayer, said refund may be credited against any tax due from said taxpayer for the succeeding calendar year.

IV. Any refund or credit due a taxpayer pursuant to paragraph III for which said refund or credit is not requested within five years shall be deemed the property of the state of New Hampshire.

77-B:8 Information Returns. Each individual, partnership, corporation, joint stock company or association or insurance company, being a resident or having a place of business in this state, in whatever capacity acting, including lessees or mortgagors of personal property, fiduciaries, employers and all officers and employees of the state or of any political sub-

division of the state, having the control, receipt, custody, disposal or payment of salaries, wages, rentals, or other compensation or income subject to the provisions of this chapter paid or payable during any year to any individual subject to a tax under this chapter shall on such date or dates as the commission shall from time to time designate, make complete return thereof to the commission.

77-B:9 Form and Verification of Returns. Returns shall be in such form as the commission may from time to time prescribe and shall be filed at any office which may be established on or before the fifteenth day of the fourth month following the close of the taxable year. In case of sickness, absence or other disability, or whenever good cause exists, the commission may allow further time for filing returns. Returns shall be verified by written declarations that the statements therein are made subject to the pains and penalties of perjury. When a return is made for a corporation or partnership, the person signing such return shall be deemed to be the person subject to the pains and penalties of perjury. The commission shall cause to be prepared blank forms for the returns and shall cause them to be distributed throughout the state and to be furnished upon application, but failure to receive or secure the form shall not relieve a taxpayer from the obligation of making the return herein required.

Withholding of Tax

77-B:10 Who Must Withhold. Every employer, as defined under the laws of the United States in effect April 26, 1947, with respect to income tax collected at its source, employing any person liable for a tax pursuant to the provisions of this chapter shall deduct and withhold upon wages paid to said employee, a tax equal to four percent of such wages subject to the provisions of RSA 77-B:13.

77-B:11 Return of Withheld Taxes. Every employer required to deduct and withhold any tax under RSA 77-B:10 shall make return thereof to the commission on or before February fifteenth in each year and shall pay quarterly the tax withheld to the commission, provided, however, that the commission may, if such action is necessary in any emergency where collection of the tax may be in jeopardy, require such employer to make such return and pay such tax at any time, or from time to time.

77-B:12 Employer's Liability. Every employer required to deduct and withhold a tax under RSA 77-B:10 is hereby made liable for such tax and is hereby indemnified against the claims and demands of any individual, corporation or partnership for the amount of any payments made in accordance with the provisions of this chapter.

77-B:13 Use of Withholding Tables. At the election of the employer with respect to such employee, the employer may deduct and withhold upon the wages paid to such employee a tax determined on the basis of tables to be prepared and furnished by the commission, which tax shall be substantially equivalent to the tax provided in RSA 77-B:10 and which shall be in lieu of the tax required in such section.

77-B:14 Amount of Withheld Taxes as Lien Against Employer. If any employer required to deduct and withhold a tax under RSA 77-B:10 neglects or refuses to pay the same after demand, the amount, including interest after such demand, together with any costs that may accrue in addition thereto, shall be a lien in favor of the state of New Hampshire upon all property and rights to property, whether real or personal, belonging to such employer. Such lien shall arise at the time the assessment and demand is made by the commission and shall continue until the liability for such sum, with interest and costs, is satisfied or becomes unenforceable. Such lien shall be valid as against any

subsequent mortgagee, pledgee, purchaser or judgment creditor when notice of such lien and the sum due has been filed by the commission with the clerk of the town or city in which the property subject to the lien is situated, or, in the case of an unorganized town or grant, in the office of the register of deeds for the county wherein such property is situated. In the case of any prior mortgage on real or personal property so written as to secure a present debt and also future advances by the mortgagee to the mortgagor, the lien herein provided, when notice thereof has been filed in the proper clerk's office, shall be subject to such prior mortgage unless the commission also notifies the mortgagee of the recording of such lien in writing, in which case any indebtedness thereafter created from mortgagor to mortgagee shall be junior to the lien herein provided for.

77-B:15 Release of Lien. The commission shall issue and record a certificate of release of the lien if:

I. The commission finds that the liability for the amount assessed and demanded, together with interest and costs, has been satisfied or has become unenforceable; or

II. There is furnished to the commission a bond with surety approved by the commission in a penal sum sufficient to equal the sum assessed and demanded, together with interest and costs, said bond to be conditioned upon the payment of any judgment rendered in proceedings regularly instituted by the commission to enforce collection thereof at law.

77-B:16 Foreclosure of Lien. The lien provided for by RSA 77-B:14 may be foreclosed in the case of real estate agreeably with the provisions of law relating to foreclosure of mortgages on real estate, and in the case of personal property, agreeably with the provisions of law relating to the foreclosure of chattel mortgages.

Estimated Tax Declarations

77-B:17 Who Must File.

I. Individuals liable for the tax assessed under this chapter shall annually on the fifteenth of the fourth month following the close of the taxable year furnish the tax commission with an estimate of income subject to taxation under this chapter for the current taxable year from which no New Hampshire withholding tax is expected to be made if such income can reasonably be expected to exceed ten thousand dollars.

II. The filing of estimates shall not be applicable to persons receiving their income from farming as defined under the United States code.

77-B:18 Payment of Estimated Tax. Each taxpayer required to file an estimated tax declaration shall include with his declaration of estimated income payment of not less than one-quarter of the tax due thereon. Thereafter, on the fifteenth days of the sixth and ninth months following the close of the taxable year the taxpayer shall pay not less than one-quarter of the tax due upon said estimated income or any revised estimate thereof.

77-B:19 Payment of Fourth Installment — General Rule. Annually on the fifteenth day following the close of the taxable year for which the estimate of income was made, the taxpayer, whose income can reasonably be expected to exceed his estimated income by thirty percent or more shall file an amended declaration of estimated income on or before such date and make payment in full of the balance of the tax due thereon, or in lieu thereof may file a return for the taxable year for which the estimate was made and pay the tax in full as computed on the return on or before the last day of the first month following the close of said taxable year. Otherwise, the final quarterly payment may be made with the taxpayer's return on the

fifteenth day of the fourth month following the close of the taxable year for which the taxes were due.

77-B:20 — Exceptions. This requirement to amend or file a return shall not apply, however, if the taxpayer files a declaration of estimated income and makes payment of the tax due thereon as provided in this chapter, based upon:

I. The tax shown on the return by the taxpayer for the preceding taxable year, if a return showing a liability for tax was filed by the taxpayer for the preceding taxable year and such preceding year was a taxable year of twelve months, or

II. An amount equal to the tax computed at the rates applicable to the taxable year, on the basis of the taxpayer's status for the taxable year, but otherwise on the basis of the facts shown on his return for, and the law applicable to, the preceding taxable year.

77-B:21 Adjustments; Procedure. The commission is empowered to determine whether there has been error in the assessment of the tax imposed by this chapter, in accordance with the following provisions:

I. The taxpayer may demand such a determination, in writing, within three years after the tax was due or paid, whichever is later;

II. The commission may, on its own motion, undertake such a determination upon written notice to the taxpayer given within three years after the tax was due or paid, whichever is later.

III. After hearing, if requested by the taxpayer, the commission shall affirm or shall increase or decrease the tax theretofore assessed. Any increase ordered by the commission shall be assessed against the taxpayer and shall carry ten percent interest from the date originally due. Any decrease ordered by the commission shall, with ten percent interest from the date

the tax was paid, be credited against any unpaid tax then due from the taxpayer and any balance due the taxpayer shall be certified to the state treasurer who shall pay the balance to the taxpayer, but such credit and payment together may not exceed the amount of the tax originally paid, plus interest.

77-B:22 Appeal. Within thirty days after notice of any adjustment of a tax by the commission under RSA 77-B:21, a taxpayer may appeal the commission's determination by petition to the superior court in the county where the taxpayer resides or, if not a resident, in the county where he has a place of business or a resident agent. The superior court shall determine the correctness of the commission's action de novo.

Miscellaneous Provisions

77-B:23 Penalty. Whoever violates any of the provisions of this chapter shall be fined not less than one hundred dollars nor more than two thousand dollars, or imprisoned not more than one year or both.

77-B:24 Disposal of Revenue. The revenue received from this tax, after paying the expense of administrating this chapter shall be paid into the general fund.

77-B:25 Investigation, etc.

I. The commission may take the oath of any person in the course of any hearing authorized by this chapter. In connection with hearings, the commission and taxpayer have the power to compel attendance of witnesses and the production of books, records, papers, vouchers, accounts or other documents. The commission and taxpayer may take the depositions of witnesses residing within or without the state pertaining to a matter under this chapter, in the same way as depositions of witnesses are taken in civil actions in the superior court. Fees of witnesses are the same as those allowed to witnesses in the superior court and in

the case of witnesses summoned by the commission shall be considered as an expense of administration of this chapter.

II. Any notice required by this chapter to be given by the commission to a taxpayer shall be made by certified mail to the last known address of the taxpayer and in the case of hearings shall be given at least ten days before the date thereof.

77-B:26 Confidentiality of Commission Records. Notwithstanding any other provision of law and except as hereinafter provided, the records and files of the commission respecting the administration of this chapter are confidential and privileged. The commission, and any employee engaged in the administration of this chapter or charged with the custody of any such records or files, shall not disclose any information obtained from the commission's records or files or from any examination, investigation or hearing authorized by this chapter. Neither the commission nor any employee of the commission may be required to produce any of the records, files and information for the inspection of any person or for use in any action or proceedings. The following exceptions apply to this section:

I. Testimony by a member or employee of the commission and production of records, files and information in behalf of the commission or a taxpayer in any action or proceeding under the provisions of this chapter where such testimony or the records or files or information, or the facts shown thereby are directly involved in the action or proceeding;

II. Delivery to a taxpayer or his duly authorized representative of a copy of any return or other paper filed by the taxpayer pursuant to this chapter;

III. Publication of statistics so classified as to prevent the identification of a particular return and the items of the return;

IV. Exchange of information with the United States internal revenue service in accordance with compacts made and provided for such cases;

V. Disclosure in confidence to the governor and council or their agent in the exercise of their general supervisory powers, or to any person authorized to audit the accounts of the commission in pursuance of such audit, or to the attorney general or other legal representative of the state in connection with an action or proceeding under this chapter.

77-B:27 Preference. The taxes and interest imposed by this chapter have preference in any distribution of the assets of the taxpayer, whether in insolvency or otherwise.

77-B:28 Dissolution of Corporations. No corporation organized under any law of this state may be dissolved until all taxes and interest required to be withheld by said corporation under this chapter have been fully paid. The secretary of state shall not issue a certificate of dissolution, and no decree of dissolution shall be signed in any court without a certificate from the commission that no taxes and interest imposed by this chapter are due and unpaid.

[RSA 77-B:2 effective July 1, 1970, and remainder of Chapter 77-B effective May 4, 1970]

MAINE REVISED STATUTES ANNOTATED

TITLE 36, PART 8

§ 5111. Imposition and rate of tax

A tax is hereby imposed for each taxable year on the entire taxable income of every resident individual of this State and on the taxable income of every nonresident individual which is derived from sources with-

in this State. The amount of the tax shall be determined in accordance with the following table:

If the taxable income is:	The tax is:
Not over $2,000	1% of the taxable income
$2,000 but not over $5,000	$20 plus 2% of excess over $2,000
$5,000 but not over $10,000	$80 plus 3% of excess over $5,000
$10,000 but not over $25,000	$230 plus 4% of excess over $10,000
$25,000 but not over $50,000	$830 plus 5% of excess over $25,000
$50,000 or more	$2,080 plus 6% of excess over $50,000

§ 5127. Credit for income tax paid to another state

1. Resident individual. A resident individual shall be allowed a credit against the tax otherwise due under this part for the amount of any income tax imposed on him for the taxable year by another state of the United States or a political subdivision thereof or the District of Columbia on income derived from sources therein and which is also subject to tax under this part.

2. Limitation on credit. The credit provided under this section shall not exceed the proportion of the tax otherwise due under this part that the amount of the taxpayer's adjusted gross income derived from sources in the other taxing jurisdiction bears to his entire adjusted gross income as modified by this part.

72:1 Persons Liable. A tax of ten dollars, to be known as the "resident tax" shall be assessed on every inhabitant of the state from eighteen to sixty-five years of age whether a citizen of the United States or an alien, except paupers, insane persons, the widow of any veteran who served in the armed forces of the United States in any wars, conflicts or armed conflicts in which it has been engaged, the widow of any citizen who served in the armed forces of any country allied with the United States in any of the wars, conflicts or armed conflicts as defined in sections 28 and 32 of this chapter, and others exempt by special provisions of law. The exemption herein provided for a widow shall be available only until she remarries.

72:5a [New] Distribution of Resident Taxes. All resident taxes shall be retained for the use of town or city in which they are collected.

77:1 Rate. The annual tax upon incomes shall be levied at the rate of four and one-quarter percent. (4¼%)

77:3 Who Taxable. Taxable income is that received during the calendar year prior to the assessment of the tax by:

I. Individuals who are inhabitants or residents of this state on January first in any year, and individuals who have ceased to be residents of this state during the preceding calendar year for such part of the year as they were residents in this state.

II. Partnerships, associations and trusts, the beneficial interest in which is not represented by transferable shares, and as hereinafter provided;

III. Fiduciaries deriving their appointment from a court of this state, and as hereinafter provided.

77:4 What Taxable. Income of the following described classes is taxable:

I. Interest from bonds, notes, money at interest, and from all debts due the person to be taxed, except interest from notes or bonds of this state, deposits in any savings bank, building and loan association, or savings department of any loan and trust company or national bank in this state or in those of any state which exempts from taxation the principal or income of deposits in such institutions in this state owned by residents of that state, and notes or bonds of any political subdivision of this state issued before May 4, 1923.

II. Dividends, other than stock dividends paid in new stock of the company issuing the same, on shares in all corporations and joint stock companies organized under the laws of any state, territory, or nation, except New Hampshire state banks, trust companies, building and loan associations, or national banks.

III. Dividends, other than stock dividends paid in new stock of the partnership, association, or trust issuing the same, on shares in partnerships, associations, or trusts the beneficial interest in which is represented by transferable shares.

77:5 Exemption. Six hundred dollars of each income otherwise taxable shall be exempt.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 73-2060

CARL M. AUSTIN, et al., Appellants

v.

STATE OF NEW HAMPSHIRE, et al., Appellees

BRIEF BY THE STATES OF MAINE AND VERMONT, AS AMICI CURIAE, IN SUPPORT OF APPELLANTS

THE INTEREST OF THE AMICI CURIAE

The State of Maine and the State of Vermont are directly affected by the continued enforcement by the State of New Hampshire of the Commuters Income Tax in N.H.R.S.A. ch. 77-B. Our citizens working in New Hampshire pay the tax in question, and by virtue of credit provisions in our tax laws are allowed to deduct the amount of the New Hampshire tax from their income tax obligations to our states. Vermont and Maine consequently are losing income tax revenues in exactly the same amounts as New Hampshire is taxing our citizens.

QUESTIONS PRESENTED

I. Whether appellants have standing to challenge as a violation of guarantees in the United States

Constitution the New Hampshire Commuters Income Tax in N.H.R.S.A. ch. 77-B?

II. Whether the New Hampshire Commuters Income Tax, in taxing income of nonresidents earned in New Hampshire but not taxing income earned by residents, violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

III. Whether the New Hampshire Commuters Income Tax, in taxing income of nonresidents earned in New Hampshire but not taxing income earned by residents, violates the Privileges and Immunities Clause of Article IV, Section 2, of the Constitution of the United States?

SUMMARY OF ARGUMENT

The appellants have standing to raise the constitutional issues in this appeal. They are attacking a tax which is being paid by them from their income earned in New Hampshire. The injury is determinable because the harm to each appellant is measured by his ratable share of the revenue lost by the State of Maine, his state of residence, and because the commuters tax withheld in New Hampshire is always in excess of the tax ultimately owed to New Hampshire and thus each appellant suffers the loss of use of such money until New Hampshire refunds that excess withheld. Moreover, since the appellants are the taxpayers, there is a nexus between appellants and the tax sufficient to allow standing under the concept of a "taxpayers suit."

The Commuters Income Tax violates the Equal Protection Clause of the Fourteenth Amendment. The statute discriminates against nonresidents, a politically impotent group, and the burden of justifying that discrimination should be placed on the State of New Hampshire. The tax in question establishes classifications based on residence, and arbitrarily taxes the class

of Maine residents while not taxing the class of New Hampshire residents. Furthermore, since the purpose of the tax is to divert tax revenues from Maine, there is no rational relation between that purpose which also affects Maine taxpayers who do not commute to New Hampshire and the economic impact of withholding on these appellants who do commute to New Hampshire.

The tax in question also violates the Privileges and Immunities Clause of Article IV, Section 2. The statute discriminates on the basis of residence, and is more burdensome for nonresidents than for residents. Even if all New Hampshire taxes are to be considered in determining whether there is an approximate equality of burden between resident and nonresident, the tax should still be found violative of the Clause because the tax must have been intended by the legislature to discriminate or because no otherwise justifiable purpose can explain why nonresidents from Vermont, Maine, and Massachusetts are taxed varying amounts under this tax.

ARGUMENT

I. THESE APPELLANTS HAVE STANDING TO RAISE THE ISSUE OF THE VALIDITY OF THE NEW HAMPSHIRE TAX

A. Introduction

The decision of the New Hampshire Supreme Court speaks in terms of the Privileges and Immunities Clause of Article IV, §2 of the United States Constitution and the 14th Amendment to the Constitution and concludes:

> "Because the tax is not discriminatory in its practical operation on these plaintiffs, the court holds it is not violative of the privileges and immunities clause or the equal protection clause of the Federal Constitution or of the

State Constitution." _____ N. H. _____, 316 A. 2d at 167-168.

Although the court formally held that the plaintiffs do have standing to sue, the decision in essence turns on what can be properly characterized as the question of standing and might well have been articulated in such terms. The court said:

> "Since these plaintiffs pay no greater tax by reason of the New Hampshire tax than they otherwise would pay to Maine, they are not prejudiced by the commuters income tax." _____ N. H. _____, 316 A. 2d at 167.

The court does not exclude the possibility of legal harm but declines to find that **these** plaintiffs have been harmed. Thus, the court without discussion accepts the plaintiff's standing and then proceeds to decide the substantive constitutional issues on a basis that would appear to question that very standing. For this reason, no complete analysis can proceed without treating the standing question as essentially unresolved.

Standing to raise an issue grounded on the United States Constitution is a question of federal law, even where a case comes from a state court. *Staub v. City of Baxley*, 355 U. S. 313, 318 (1958); *Doremus v. Board of Education*, 342 U. S. 429, 434 (1952); *First National Bank v. Anderson*, 269 U. S. 341, 346 (1926).

In *Flast v. Cohen*, 392 U. S. 83 (1968), this Court broadened the law of standing, going beyond the historic and rather narrow limits of such cases as *Frothingham v. Mellon*, 262 U. S. 447 (1923). *Frothingham* and its progeny had come to stand for the proposition that a federal taxpayer *qua* taxpayer is without standing to challenge the constitutionality of a federal spending statute. While the Court in *Flast* distinguished *Frothingham*, it was clear from Justice Warren's opinion that despite the facts that "a federal taxpayer's 'interest in the moneys of the treasury . . .

is comparatively minute and indeterminable' and that 'the effect upon future taxation, of any payment out of the [Treasury's] funds, . . . [is] remote, fluctuating and uncertain,' " *Flast v. Cohen*, id. at 92, quoting in part *Frothingham v. Mellon*, 262 U. S. at 487, such a taxpayer would nevertheless have standing in certain instances. We submit that, while these plaintiffs certainly do have standing under the liberalized rules of *Flast* and its progeny, the standing issue in this case can be resolved without reaching the issues raised by *Flast* by reliance on more traditional notions of standing.

B. A Taxpayer Challenging the Imposition of a Tax Has Automatic Standing

We assert that because the plaintiff-taxpayers are challenging the constitutionality of a tax which is imposed directly on them, they necessarily have standing to litigate the constitutionality of that levy.

The issue of whether a taxpayer challenging such a levy has standing solely by virtue of his being subject to the levy has seldom been explored. We would suggest that the reason why few if any cases have discussed this problem is that it is almost always **assumed** that the persons paying the improper levy automatically have standing.[1] The reason is simply that persons paying the tax are generally the persons affected economically by the tax. Here, the Maine tax credit might appear to weaken this argument of **automatic** standing, because the credit results in the same ultimate tax burden on commuters and other Maine taxpayers, ignoring for the moment the fact that the Maine commuters lose the use of at least a part of the

[1] "I do not speak of a suit by a taxpayer to enjoin the collection of a tax, which clearly would satisfy the classical plaintiff requirement, but of a suit to enjoin an expenditure." Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. Pa. L. Rev. 1033, 1034 (1968).

funds withheld by New Hampshire. But the fact that the appellants' ultimate burden arguably might be unaffected were this court to invalidate the New Hampshire law in no way impairs their standing to raise the question.

This proposition is demonstrated by *Allied Stores of Ohio, Inc. v. Bowers*, 358 U. S. 522 (1959), a case dealing with the standing of a person asserting an invalid exercise of the taxing, rather than the spending, power. In *Allied Stores*, the Supreme Court of Ohio had declared that the plaintiff-taxpayer lacked standing because it would still be subject to the tax should the exemption granted to the nonresident corporation be invalidated by that court. This Court, however, unequivocally rejected the reasoning of the Supreme Court of Ohio and held that the plaintiff-taxpayer **did** have standing despite the fact that the taxpayer "[could not] show that his tax [would] be affected if the [nonresidents were compelled, by a denial of the exemption, to] pay." Davis, *Standing: Taxpayers and Others*, 35 U. Chi. L. Rev. 601, 612 (1968). Here, we have an infinitely stronger case — for, as we shall next demonstrate, the tax burdens borne by **all** Maine taxpayers, including the plaintiffs here, **are** in fact affected by the imposition of the New Hampshire Commuters Tax on those Maine citizens who work in New Hampshire. Moreover, the individual Maine commuters from whom New Hampshire withholds 4 percent of their New Hampshire income suffer a concrete and easily calculable injury resulting from their **temporary** loss of the use of at least part of their money which has been withheld by New Hampshire. See Part I. C.2. infra for a discussion of the nature of this injury.

C. The Interest of These Plaintiffs is Determinable

1. Each Maine Taxpayer suffers a determinable injury arising from New Hampshire's raid on the Treasury of Maine.

These appellants have the necessary stake in the outcome of this litigation. Even before *Flast*, under the *Frothingham* test, their interest would have been determinable. In *Frothingham*, the plaintiff's interest was indeterminable for at least two reasons, one, the dilution of the plaintiff's interest among the interests of millions of other citizens, but even more important, the difficulty of fixing an accurate dollar figure on the aggregate federal expenditure involved.

Neither problem is here present. First, the taxes paid by these appellants to New Hampshire are obviously calculable in each case. Second, the aggregate tax credits granted by the State of Maine on account of such taxes are precisely calculable. The burden to each appellant is most accurately described as that appellant's ratable share of the revenue lost to the State of Maine and made up by higher taxes to all the taxpayers of Maine. For example, in 1971, at least $400,000.00 was allowed as an aggregate credit to Maine taxpayers on account of the New Hampshire Commuter Income Tax. Obviously, this loss fell on **all** Maine taxpayers in proportion to their individual tax burdens.

Without attempting to make such minute distinctions here, it is clear that, **on average**, each of the approximately one million Maine taxpayers suffered direct pecuniary harm in the amount of at least $.40. Looking at the class of persons affected by New Hampshire tax law as being (for present purposes) all New Hampshire and Maine taxpayers, the subclass designated Maine taxpayers is arbitrarily discriminated against, each in the average amount of at least $.40. (See Part II. B.1. below, where this point is considered more fully in the context of equal protection.)

2. Each Maine commuter is also injured in fact by the loss of the use of at least part of his or her money which has been withheld by New Hampshire.

Besides the burden which each of the appellants here shares with all Maine taxpayers, the provision of the New Hampshire Commuters Income Tax which subjects each of the appellants here to withholding of four percent of his or her New Hampshire derived income imposes an injury which is in addition to the pecuniary injury which the appellants share with all their fellow taxpayers of Maine.

The tax ultimately imposed by New Hampshire on a nonresident commuter cannot exceed the tax which would be imposed by the nonresident's state of residence on an amount of income equal to that derived by the nonresident from his employment in New Hampshire. N.H.R.S.A. ch. 77-B, §2(II) (1970). Yet, at the withholding stage, New Hampshire makes no distinction between residents of states whose tax rates are higher than those of New Hampshire and those (as is Maine's) whose rates are lower. New Hampshire withholds four percent of each commuter's New Hampshire income. N.H.R.S.A. ch. 77-B, §10. Inasmuch as Maine imposes a lower rate of tax, See Appendix B, p. 30, if Maine were withholding the money from these appellants it would be withholding less from appellants than the four percent which New Hampshire presently withholds. While New Hampshire eventually returns to the commuter the amount by which the four percent withheld exceeds the maximum tax which would be imposed by the commuter's state of residence, see N.H.R.S.A. ch. 77-B, §7(III), (and is, as mentioned, imposed by New Hampshire if that tax is less than 4%, see N.H.R.S.A. ch. 77-B §2(II)), the fact remains that, because during the course of the tax year New Hampshire withholds more than Maine would have withheld, Maine commuters incur measurable and concrete pecuniary injury resulting from the loss of the use of the money that New Hampshire withholds but Maine would not have withheld. In light of the rapidly increasing cost of money in recent years, this withholding injury amounts to a

sizeable sum out of the pocket of each Maine commuter.

D. The Present Case Could Be Deemed a "Taxpayers Suit" for Purposes of Standing.

The present case on appeal could be squarely governed by the liberalized rules for standing laid down in *Flast*, even though it is not a taxpayer's suit in the sense that taxing **and** spending are involved but rather taxing alone. In "taxpayers suits," as that term of art has evolved, the interest of the plaintiffs has concerned the **spending** by Congress or a state in violation of the Constitution. The taxpayer's status *qua* taxpayer is simply the reason, the "nexus" to use the language of *Flast*, that the plaintiff has grounds to complain. We assert that the taxing and spending power of Congress (or the concomitant powers of a state) is abused at least as much where the levy itself — the tax imposed — is unconstitutional, as where revenues, once raised by valid taxation, are **used** by the government in a manner that contravenes some specific mandate of the Constitution.

All of the technical as well as policy aspects of *Flast* have been met by these appellants. There is a clear nexus between these appellants and the enactment in question, under either *Frothingham* or *Flast*. These appellants as taxpayers are the very objects of the tax enactment. Under the "first aspect" of the nexus test, "a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, §8 of the Constitution." 392 U. S. at 102. It is not disputed that the New Hampshire tax in question is imposed under analagous authority in the New Hampshire Constitution. See New Hampshire Constitution, Pt. 2, Art. 5.

As the second leg of the nexus test, again these appellants are in at least as favorable a position as the plaintiffs in *Flast*. Their status as taxpayers is closely

related to the constitutional infringement in issue, the two-fold violation of the equal protection clause of the 14th Amendment and Article IV, §2 of the Constitution. While Article IV, §2 does not speak to a direct legislative prohibition, as spoken of in *Flast* [392 U. S. at 102-103.], the 14th Amendment in §1 clearly does.

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws."

This prohibition applies to the states with the same directness as the First Amendment prohibition against laws respecting the establishment of religion. Compare *Flast*, 392 U. S. at 105-106.

II. THE NEW HAMPSHIRE TAX STATUTE DEPRIVES THESE PLAINTIFFS OF THE EQUAL PROTECTION OF THE LAWS.

A. A Statutory Classification Must Be Rationally Related to The Achievement of Permissible State Objectives.

New Hampshire's power to classify taxpayers is subject to the requirements of the equal protection clause of the Fourteenth Amendment. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U. S. 522, 526 (1959); *Ohio Oil Co. v. Conway*, 281 U. S. 146 (1930). While the Fourteenth Amendment does not impose an iron rule of equality of taxation, it does limit the taxing power of the States so that all persons in like circumstances shall be treated alike, "both in privileges conferred and liabilities imposed." *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 293 (1898); *see Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550, 555 (1935).

The test which must be met by a state statute is that its classification have a "fair and substantial" relation to the object of the legislation, *Hartford Steam Boiler*

Inspection & Insurance Co. v. Harrison, 301 U. S. 459, 461 (1937); *Louisville Gas & Electric Co. v. Coleman*, 277 U. S. 32, 37 (1928); "so that all persons similarly circumstanced shall be treated alike," *F. S. Royster Guano Co. v. Virginia*, 253 U. S. 412, 415 (1920); *Air-Way Electric Appliance Corp. v. Day*, 266 U. S. 71, 85 (1924); *Schlesinger v. Wisconsin*, 270 U. S. 230, 240 (1926). Despite the broad range of a state's discretion in establishing classifications in taxing statutes, mere differences between persons included in different classes is not sufficient: the attempted classification ". . . must always rest upon some difference which bears a **reasonable and just relation to the act** in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis" (emphasis supplied). *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U. S. 150, 155 (1897).

We submit that this Court must be particularly careful in determining whether the classifications produced by the New Hampshire statute are rationally related to the achievement of legitimate state objectives. The rationale behind the traditional rational relation test and the deference it pays to legislative classifications is that "[o]rdinarily, the legislative judgment, which ideally expresses the harmonized outlooks of the various groups in the community, is entitled to considerable respect in its evaluation of proper objectives for state action and rational means for attaining them". *Developments in the Law — Equal Protection*, 82 Harv. L. Rev. 1065, 1125 (1969). This "considerable respect" alluded to means, of course, that there is a presumption of constitutionality, *see, e.g., San Antonio School District v. Rodriguez*, 411 U. S. 1, 44 (1973), and the burden of showing that a particular classification is not rationally related to the furtherance of a permissible state objective rests upon the party challenging the statute. We contend that in this case the Court should utilize a standard of review

more searching than the rational relation test and, in so doing, should thrust upon the State of New Hampshire the burden of justifying the patent discrimination found in its statute, namely taxation of Maine residents and not equally taxing New Hampshire residents. When a state statute discriminates against a politically impotent group, as the class of nonresidents undeniably is, then, just as when Congress legislates for people by whom it was not elected, "[i]n this context, at least, the normal arguments for judicial restraint become no more than hollow shibboleths grotesquely detached from the logic which once supported them. There is no reason to pay deference to the views of a representative body which does not in fact represent those against whom it is discriminating." *United States v. Thompson*, 452 F. 2d 1333, 1341, (D.C. Cir. 1971); *see United States v. Carolene Products Co.*, 304 U.S. 144, 152-153 (1938); *D.C. Federation of Civic Associations, Inc. v. Volpe*, 434 F.2d 436 (D.C. Cir. 1970); *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969). Not only is mere residency insufficient to justify the New Hampshire tax under the usual or "rational relation" test, were the burden to be shifted here, as we feel it should be, New Hampshire would be even more incapable of sustaining that burden. Indeed, the discriminatory nature of the commuter tax is so evident that New Hampshire felt compelled to enact a corresponding "tax" on its own residents so as to create an illusion of equality of treatment. See N.H.R.S.A. ch. 77-B, §2(I).[2] We would also add that the thorough scrutiny undertaken by this Court in response to constitutional challenges by nonresidents claiming viola-

[2] This "tax" is illusory because under no circumstance will any tax ever have to be paid to New Hampshire by the New Hampshire resident on the income he earns outside of New Hampshire. First, if the other state levies a tax then the payment of that tax to the other state constitutes full satisfaction of the New Hampshire tax obligation. On the other hand, if the other state levies no tax, then New Hampshire does not either.

tion of Article IV, §2, *see, e.g., Toomer v. Witsell*, 334 U. S. 385 (1948), while undoubtedly attributable in part to a concern that interstate commerce should remain unimpeded, nonetheless lends support to our position that the traditional deference paid to the state legislative prerogative is unwarranted when a politically impotent group is the object of the legislation.

B. The New Hampshire Tax Statute Creates Irrational and Arbitrary Classifications.

1. The distinction drawn between all New Hampshire taxpayers and all Maine taxpayers is an arbitrary one.

The New Hampshire tax law should be considered in light of correct classification analysis. As in any such analysis, we deal logically with a major or overall class and the purportedly defensible subclasses created. The overall class here consists of all persons potentially affected by the New Hampshire tax, i.e., all the taxpayers of Maine and New Hampshire. (The non-commuting Maine taxpayers are properly a part of this overall class, since the New Hampshire tax is based on the existence of the Maine tax credit, which credit spreads the cost of the New Hampshire tax onto all Maine taxpayers.)

Within this overall class, the New Hampshire law establishes two subclasses, Maine residents and New Hampshire residents; only the former pay taxes, based upon income earned in New Hampshire. There is no conceivable basis for this classification. The point would be easier to demonstrate if Maine and New Hampshire were the two counties of a single state. Obviously, not even the broad legislative discretion afforded the states in tax matters would let the residents of one geographical subdivision pay taxes on compensation for services performed in the other where residents of the other paid no taxes at all. Even less may one state of the Union impose a tax burden on all the

taxpayers of Maine for services performed in New Hampshire when absolutely no burden at all is imposed by New Hampshire when those same services are performed by New Hampshire residents.

2. The distinction drawn between Maine taxpayers who commute to New Hampshire and those who do not is an arbitrary one.

As already discussed, each Maine "commuter" is subject to the withholding of 4% of his or her income by the New Hampshire employer. Admittedly, the mere act of withholding might well not constitute legal harm in most tax schemes. *Travis v. Yale & Towne Manufacturing Co.*, 252 U. S. 60, 77 (1920). Congress or state legislatures determine which taxpayers are subject to withholding and which are not, and this legislative matter is certainly not normally subject to court review any more than tax rates or other details of any tax scheme. *Allied Stores of Ohio, Inc. v. Bowers*, *supra* at 526-527. But where the sum is withheld by New Hampshire from a particular commuter taxpayer simply as a means of giving New Hampshire access to Maine tax revenues, which access and intrusion results in the imposition of a tax burden on each and every person who pays taxes to Maine, no rational relation exists between the **purpose** of the New Hampshire tax, which is the diversion of tax revenues from Maine to New Hampshire, and the economic impact on these particular appellants, who are, by accident of geography, the agents of New Hampshire's discriminatory tax. By comparative example, a tax scheme whereby all persons with hair were subject to a tax but only those with red hair were subject to withholding, would be "palpably arbitrary," *id.* at 527, and would not pass even the minimal scrutiny test. The New Hampshire scheme is certainly no more rational in fact than such an example.[3]

[3] In addition to the two arbitrary distinctions we have discussed, it is interesting that there is a third, for the distinc-

III. THE COMMUTERS TAX DEPRIVES APPELLANTS OF PRIVILEGES AND IMMUNITIES GRANTED BY NEW HAMPSHIRE TO ITS OWN CITIZENS

A. Introduction.

The purpose of the Privileges and Immunities Clause in Article IV, Section 2, of the Constitution of the United States has been expressed by this Court in various ways. In *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868), this Court said:

> "It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned."

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tion drawn between different groups of nonresidents is an arbitrary one. Inasmuch as the New Hampshire tax is limited to the maximum that would be imposed by the nonresident's state of residence on an amount of income earned in that state, commuters from states, such as Maine, which have tax rates well under 4% will pay less to New Hampshire than would commuters from states whose tax rates equal or exceed 4%. (See the hypotheticals we present in the Appendix.) It is thus clear that, as between commuters from different states, New Hampshire imposes on these different nonresidents "similarly circumstanced" in every respect but that of state of residence, disparate tax burdens solely by reason of a particular commuter's domicile. Even assuming *arguendo* that New Hampshire could properly require nonresidents as a group to shoulder a portion of New Hampshire's operating expenses, forcing a particular group of nonresidents to bear a more severe burden than commuters from another state could be reasonably related to New Hampshire's permissible interests only if that greater burden could be justified by a showing that that particular group of nonresidents derives from New Hampshire more substantial services and benefits. There has been no such showing in this case. The distinction drawn between commuters from different states is a wholly arbitrary one which in no way advances the achievement of New Hampshire's legitimate objectives.

In *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77 (1873), this Court in dictum explained the meaning of the Clause by saying:

> "Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction."

In applying the Privileges and Immunities Clause to taxation by one state of citizens of another state, this Court has sought to determine whether the burden placed on the citizens of that other state was substantially equal to the burden which the taxing state placed on its own citizens. In *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870), the Clause was described as exempting citizens of one state from higher taxes than the state of sojourn levies against its own citizens, and, at 79 U.S. 431: "[T]hat supreme law [the Constitution] requires equality of burden, and forbids discrimination in State taxation when the power is applied to the citizens of the other States." Since most of the state taxing or licensing statutes attacked on the basis of the Privileges and Immunities Clause have been drawn in terms of "nonresidents" and "residents," this Court has recognized that if there is discrimination against all nonresidents then the discrimination necessarily must be against citizens of other states. *Toomer v. Witsell*, 334 U.S. 385 (1948); *Travis v. Yale & Towne Manufacturing Co*, 252 U.S. 60 (1920).

The first decisions by this Court concerning an income tax of one state which reached the income earned in that state by citizens of another state were *Shaffer v. Carter*, 252 U.S. 37 (1920), and *Travis, supra.* Both cases dealt with income tax statutes which taxed the incomes of both residents and nonresidents; the New

Hampshire statute here drawn into question taxes nonresidents but in practical effect does not tax residents. In *Shaffer*, this Court upheld a state income tax statute which taxed at the same rate all income earned by residents and the income earned within the state by nonresidents. In *Travis*, this Court held that the New York income tax statute which granted exemptions to residents but denied the same exemptions to nonresidents was unfairly discriminatory and violated the Privileges and Immunities Clause of Article IV, Section 2, of the United States Constitution.

Three independent arguments for the invalidity of the New Hampshire Commuters Income Tax under the Privileges and Immunities Clause are discussed in the following three subheadings.

B. Discrimination Between Resident and Nonresident; No Logical Justification.

The New Hampshire statute attacked in this appeal is discriminatory on its face. Income taxes are only imposed on nonresidents working in New Hampshire. No income tax is imposed on New Hampshire residents working in New Hampshire. The income tax supposedly imposed on New Hampshire residents working outside the state, under N.H.R.S.A. ch. 77-B, §2(I), is in practical effect no tax at all. The discrimination between resident and nonresident is clear.

The concept that the income taxes of nonresidents must not be more burdensome than those imposed on residents was the basis of the *Travis v. Yale & Towne Manufacturing Co.*, 252 U.S. 60 (1920) decision, where this Court found unfair discrimination in the denial by New York of exemptions to nonresidents which were given to residents. The denial of the exemptions to nonresidents made the New York income tax more onerous for nonresidents than for residents. The New Hampshire tax attacked here is certainly more onerous for nonresidents than for residents. The

tax discriminates between nonresidents and residents solely on the basis of residence. The discrimination does not appear in any way to be designed to assure equality of burden or to withdraw an unfair advantage held by nonresidents, and a tax which has differing rates for resident and nonresident, when not justifiable, is unconstitutional as a violation of the Privileges and Immunities Clause of Article IV, §2. *Smith v. Loughman*, 245 N.Y. 486, 157 N.E. 753 (Cardozo, Ch-J.), *cert. denied*, 275 U.S. 560 (1927). Courts have held violative of the Privileges and Immunities Clause state statutes which without justification taxed only the property of nonresidents, *Bivins v. Board of Comm'rs*, 66 F. 2d 351 (10th Cir. 1933), or which denied to nonresidents tax credits given to residents, *Borden v. Selden*, 259 Iowa 808, 146 N.W. 2d 306 (1966).

This Court must decide in the present appeal whether a state will be allowed to tax the incomes of nonresidents while not taxing its citizens by the same measure or at the same rate. The State of New Hampshire has no comparable substitute tax levied against its citizens which is measured by their incomes.

This situation is not at all like the backgrounds of the two property tax cases decided by this Court upholding taxes levied only against nonresidents, where complementary taxes against residents were based on the same measure, the value of the property. In *Travellers' Insurance Co. v. Connecticut*, 185 U.S. 364 (1902), decided before *Shaffer*, this Court upheld an *ad valorem* tax levied against nonresident owners of shares of stock of local corporations, while resident holders of shares of stock in the same corporations paid no tax to the state. Discrimination at the level of the entire system of property taxation was not present, however, because residents were subject to local taxation of the shares of stock at varying local rates whose average was equal to the rate paid by nonresidents

under the state tax, while nonresidents were not subject to local taxation. In *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926), decided shortly after *Shaffer*, this Court, although in response to a Fourteenth Amendment and not an Article IV, §2, attack, upheld a state *ad valorem* tax on the property of nonresident corporations because the tax was in lieu of and the substantial equivalent of the average local tax burden of resident corporations owning the same type of property.

The *Travis v. Yale & Towne Manufacturing Co.*, 252 U.S. 60 (1920), decision does not indicate that this Court considered or the parties raised the issue of whether the difference in burdens of the New York income tax could be justified by other state taxes paid by residents and not by nonresidents. If this Court in *Travis*, involving exemptions affecting only the amount of the burden for nonresidents when residents were paying the same tax, decided to ignore other taxes paid only by residents, then in this case there should be no resort to the burdens of other taxes paid only by residents since the variation in burdens under this tax is infinite, given that residents are not subject to the tax. We consequently assert that the invalidity of the tax is clear on the face of the statute, and that the inquiry need go no further.

Assuming that the State of New Hampshire before this Court will assert as justification for the discrimination that there is, with the commuters tax, an approximate equality of burden in terms of all New Hampshire taxes borne by residents and nonresidents, and assuming that in *Travis* this Court did not consider the issue of whether equality of burden could be proven by resort to an analysis of the entire tax structure, then the inquiry must turn to new questions. The argument that there is an equality of burden when the entire tax structure of New Hampshire is considered raises first the question of who has the burden of proof.

Should New Hampshire be required to prove an equality, or should appellants be forced to prove an inequality?

Although it is not entirely clear from the record, New Hampshire evidently did not assert that there was an approximate equality of burden, and did not attempt to show any such equality in the courts below in response to the Privileges and Immunities Clause attack. New Hampshire has the detailed information on taxes paid by nonresidents, under the tax in question, as well as on revenues from other New Hampshire taxes. Since New Hampshire evidently did not raise in the courts below the equality of burden justification based on other tax burdens of its residents, appellants did not ask for information which would be the basis of a comparison of burdens, and appellants should not be given now the burden of proof where appellees have the needed information. *Cf. Mullaney v. Anderson*, 342 U.S. 415 (1952).

Any analysis of the entire New Hampshire tax structure raises conceptual problems in determining whether the burdens of the nonresident and resident are approximately equal. As mentioned above, none of the New Hampshire taxes are complementary to the tax in question. Other New Hampshire taxes are the meals and rooms tax, gasoline tax, cigarette tax, business profits tax, unearned income tax, ten dollar per capita tax on residents, industry taxes, and local real estate taxes. Contorted calculations of the respective burden of residents and nonresidents would be meaningless. The burdens of the taxes on New Hampshire residents are clearly indirect and difficult to calculate, except for the per capita tax and the unearned income tax. Moreover, although the court below asserted by implication that nonresidents pay none of the above taxes, nonresident salesmen and other workers are surely paying the gasoline and the meals and rooms taxes on products and services they purchase in New

Hampshire. We submit that this commuters income tax cannot be justified by evidence that would show an approximate equality of burden, because there is no such evidence.

This Court, however, need not answer an equality of burden justification by deciding who has the burden of proof. The statute on its face belies the validity of any argument that the statute was intended to equalize burdens or to take away an unfair advantage held by nonresidents. First, the tax on New Hampshire residents working outside New Hampshire is in practical effect no tax at all. That purported tax is meaningless. It must have been intended simply to disguise the intended discrimination against nonresidents. Second, nonresidents from different states, with the same New Hampshire derived incomes, are taxed unequally.

Any equality of burden justification which New Hampshire might put forward in support of the discrimination between residents and nonresidents would have to explain why New Hampshire has chosen to place varying burdens on nonresidents according to their place of residence and the income tax status of those states. In N.H. R.S.A. ch. 77-B, §2, the amount of the commuter's tax is the lesser of (1) four percent of New Hampshire derived income, after deducting the two thousand dollar exemption, or (2) the tax which would be imposed by the state of residence if the New Hampshire derived income had been earned by the nonresident in his state of residence. Since the rates of the income taxes in Vermont, Maine, and Massachusetts are each different and differ from New Hampshire's four percent figure, the tax placed on a nonresident from Vermont is not the same tax as that placed on a Maine resident having the same New Hampshire derived income, for example. The variations in burdens are shown in detail in Appendix B, p. 30.

Any equality of burden argument which New Hampshire might make would be illogical in view of the fact that a nonresident from Vermont does not contribute the same tax dollars to New Hampshire that a Maine resident does, or that in some cases a Massachusetts resident does. The use of New Hampshire's governmental services, or the advantages gained by the availability of services in New Hampshire, cannot vary logically by the state of residence of the nonresident.

Is there any argument which New Hampshire can advance in support of an income tax which is only applied against nonresidents, when the statute at the same time dictates differences in burdens among nonresidents merely because of their different states of residence? We have yet to hear from New Hampshire the independent reasons for the discrimination involved in taxing nonresidents but not residents which will satisfy the *Toomer v. Witsell*, 334 U.S. 385 (1948), requirement that the degree of discrimination must bear a close relation to the valid independent reasons advanced to justify the discrimination.

The *Toomer* inquiry, whether valid independent reasons exist for the disparity of treatment between residents and nonresidents and whether the degree of discrimination bears a close relation to the reasons advanced, is important for protecting the purpose of the Privileges and Immunities Clause, to protect citizens from one state from unfair discrimination at the hands of another state. Citizens of a state have political power in that state, and the existence of that power operates as a natural check upon the conduct of elected representatives in drafting tax legislation for the state which affects its citizens. Citizens of another state, however, have no political power in the state of sojourn. The elected representatives of the state of sojourn do not represent the nonresidents' interests. The absence of that political power creates the need for close judicial scrutiny of the purported reasons for the discrimina-

tion and their relation to the degree of discrimination, when a nonresident attacks as a violation of the Privileges and Immunities Clause of Article IV, §2, a statute aimed only at nonresidents.

We submit that the *Toomer* inquiry should be the standard to be applied in judging the validity of the New Hampshire Commuters Income Tax. We further submit that there is no independent reason for an income tax only imposed on nonresidents, which also explains reasonably the need for different treatment of nonresidents from different states.

C. Discrimination Among Nonresidents.

The reason for close judicial scrutiny when judging a statute's discrimination between resident and nonresident applies with equal force when the discrimination is among nonresidents. The statute here in question discriminates among nonresidents of different states by taxing them in amounts or at rates which vary according to the nonresident's state of residence. We cannot imagine any proper purpose of the State of New Hampshire which would justify the imposition of unequal taxes on nonresidents with the same income but with different states of residence. The variations in the burdens of nonresidents illustrated in Appendix B, p. 30, cannot be supported.

If the variation in the New Hampshire Commuters Income Tax burdens borne by individuals from Vermont, Maine, and Massachusetts is unjustifiable under the *Toomer v. Witsell*, 334 U.S. 385 (1948), inquiry, then the Commuters Income Tax should be declared in violation of the Privileges and Immunities Clause. We concede that no decision by this Court can be relied on to support the contention that unequal treatment among nonresidents from different states constitutes a violation of the Clause. The contention is a novel one. If the purpose of the Clause is to prevent unfair discrimination by the taxing state against nonresidents,

however, the issue of the taxing state's discriminating among nonresidents without apparent justification would seem to be within the ambit of the Clause.

D. Nonresidents As The "Peculiar Source".

A state's objective of forcing nonresident commuters to bear a share of the burden of New Hampshire public expenses is, of course, a reasonable one. The reasonableness of this objective, however, does not confer on New Hampshire the unbridled right to employ any means whatsoever to achieve that objective. As explained in *Toomer v. Witsell*, 334 U.S. 385, 398 (1948):

> "[The] argument assumes that any means adopted to obtain valid objectives necessarily [square] with the privileges and immunities clause. It overlooks the purpose of that clause ... to outlaw classifications based on the fact of non-citizenship **unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed** ...." (emphasis supplied.)

A general income tax, as is the New Hampshire commuter tax, is designed to produce general revenues which may be then expended by the state for myriad legitimate public purposes and services which will benefit both residents and nonresident commuters alike. There is no doubt that the state can impose an income tax subjecting to New Hampshire taxation the income of nonresidents which is derived from their employment in that state. *Shaffer v. Carter*, 252 U.S. 37 (1920); *Travis v. Yale & Towne Manufacturing Co.*, 252 U.S. 60 (1920). The nonresidents can thus be compelled, by means of an income tax, to share a **portion** of the burden of the state's general operating expenses. Perhaps nonresidents further could be forced to bear the entire burden of certain specific expenses incurred by New Hampshire if the nonresidents, as a

group, constitute the "peculiar source" of that specific expense the state incurs. However, where a state tax statute is discriminatory on its face because it draws a classification based on state citizenship, and imposes a higher tax rate on nonresidents than it does on residents, the state, to establish the constitutionality of such a statute, must show "something to indicate that non-citizens constitute a peculiar source" of the state expense which the tax is designed to alleviate. In other words, New Hampshire would have the burden of showing here that nonresidents as a group are a **peculiar source** of, or directly responsible for a specific percentage of the general operating expenses which the state incurs, and which an income tax is intended to cover. This New Hampshire has not done. The New Hampshire Commuter Income Tax therefore discriminates against nonresidents and, in so doing, violates Article IV, §2 of the United States Constitution.

E. The Opinion of the New Hampshire Supreme Court.

We submit that the analysis of the Clause by the court below was in error. By stressing the credit given by Maine for taxes the Maine commuters pay under the commuters tax, the court below misapplied the concept in *Shaffer v. Carter*, 252 U.S. 37, 55 (1920), that niceties of definition or of theory are less important than "... the practical operation and effect of the tax imposed." The court below treated the *Shaffer* concept as a justification for ignoring the unequal treatment of resident and nonresident by the New Hampshire statute. The court below decided that because of the Maine credit there was no prejudice to the Maine resident in the sense of a competitive disadvantage and because the Maine resident was not subject to an increased overall income tax liability by virtue of his New Hampshire employment.

We focus instead on whether residents and nonresidents are treated equally by the New Hampshire stat-

ute itself. The *Shaffer* concept of evaluating the validity of a statute by its practical operation and effect does not mean that statutes of other states can be used to rescue an otherwise unconstitutional statute. That Maine gives to its residents on their Maine income tax returns a credit for the New Hampshire Commuters Income Tax paid by them does not justify New Hampshire's discriminating against Maine commuters, without justification.

In *Shaffer*, this Court's examination of the practical operation and effect of the tax was restricted to the single tax law in question and did not include those of the nonresident's state of residence. Can the constitutional validity or invalidity of tax statutes in state A be so easily decided by reference to statutes in state B, or must the statutes of state A be judged on their own merits? Bear in mind that although the amount of the New Hampshire tax on Maine residents is based on the Maine tax statutes, the exaction of the New Hampshire tax is not conditioned on the existence of a credit given by Maine to its residents. The New Hampshire tax is imposed on a nonresident regardless of whether or not the nonresident's state of residence grants a tax credit for the New Hampshire tax. Can it be said that if state B, i.e. Maine, changes its statutes, for instance by dropping the credit, then the statutes in state A may be constitutionally invalid whereas they were not invalid before the change? We emphatically suggest that the credit given by Maine ought not to be considered in addressing the validity under the Privileges and Immunities Clause of the statute in question. Although it may be argued because of the credit that the individual plaintiffs bore no heavier personal tax burden than they would have had without the commuters tax, that circumstance could affect, if anything, only the question of standing (and we certainly contend that it has no such effect) and not the substantive issue concerning the Clause.

The mere assertion in the opinion, moreover, that this tax operates to produce equality ought not to be sufficient to justify the tax as equalizing the burden between resident and nonresident. The assertion that nonresidents pay nothing for state services is not supported by anything found in the record. As was pointed out earlier, commuters doubtless contribute at least by means of the meals and rooms tax and the gasoline tax. The court below accepted the Commuter Income Tax as redressing an imbalance whose existence and degree were not really known. Furthermore, the court below ignored the varying treatment accorded nonresidents from different states.

CONCLUSION

Maine and Vermont submit that appellants have standing to raise the important constitutional issues in this case. Maine and Vermont submit that the Commuters Income Tax unfairly and arbitrarily discriminates against nonresidents, and should be found to contravene the guarantees of the United States Constitution found in the Privileges and Immunities Clause in Article IV, Section 2, and in the Equal Protection Clause in the Fourteenth Amendment. Accordingly, the Court should hold the Commuters Income Tax an invalid exercise of New Hampshire's taxing power, and reverse the decision of the court below.

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APPENDIX A

NEW HAMPSHIRE STATUTES

N.H.R.S.A. ch. 77-B

Selected Sections

77-B:1 Definitions. As used in this chapter the following terms shall have the following meanings unless the context clearly requires otherwise: . . . . .

X. "New Hampshire derived income" shall mean, for any taxable year:

(a) rents, royalties and gain derived from the ownership of property within the state;

(b) wages, salaries, fees, commissions or other income received with respect to personal services performed of whatever kind and in whatever form paid derived from activities (1) performed within this state, or (2) performed from a base of operations within this state and not subject to an income tax within the state where the services are performed.

(c) income derived from every business, trade, occupation or profession of the taxpayer to the extent that the business, trade, occupation or profession is carried on within the state. But New Hampshire derived income shall not include any income excluded from adjusted gross income as defined in this section nor any taxable business profits taxed pursuant to the business profits tax.

77-B:2 Tax Imposed.

I. On Residents, Income Earned Outside New Hampshire. A tax is hereby imposed upon every resident of the state, which shall be levied, collected and paid annually at the rate of four percent of their income which is derived outside the state of New Hampshire as defined in RSA 77-B:1 "New Hampshire taxable income;" provided, however, that if such income shall be subject to a tax in the state in which it is derived, such tax shall constitute full satisfaction of the tax hereby imposed; and provided further, that if such income is exempt from taxation because of statutory or constitutional provisions in the state in which it is derived, or because the state in which it is derived does not impose an income tax on such income, it shall be exempt from taxation under this paragraph.

II. On Nonresidents, Income Earned in New Hampshire. A tax is hereby imposed upon every taxable nonresident, which shall be levied, collected and paid annually at the rate of four percent of their New Hampshire derived income as defined in RSA 77-B:1 less an exemption of two thousand dollars; provided, however, that if the tax hereby imposed exceeds the tax which would be imposed upon such income by the state of residence of the taxpayer, if such income were earned in such state, the tax hereby imposed shall be reduced to equal the tax which would be imposed by such other state.

III. Exception. Notwithstanding the provisions of paragraphs I and II, no tax shall be imposed upon salaries paid to men or women in the armed forces of the United States.

77-B:7 Returns and Refunds of Individuals.

. . . . . .

III. Whenever a taxpayer shall file a return which shows that his withholding tax or estimated tax ex-

ceeds the amount of tax liability due under this chapter, he shall be due a refund and the tax commission shall forthwith certify the amount of said refund to the state treasurer who shall pay the same to the taxpayer; provided, however, that at the option of the taxpayer, said refund may be credited against any tax due from said taxpayer for the succeeding calendar year.

77-B:10 Who Must Withhold. Every employer, as defined under the laws of the United States in effect April 26, 1947, with respect to income tax collected at its source, employing any person liable for a tax pursuant to the provisions of this chapter shall deduct and withhold upon wages paid to said employee, a tax equal to four percent of such wages subject to the provisions of RSA 77-B:13.

APPENDIX B

EXAMPLES OF THE VARIATIONS IN THE COMMUTERS TAX BURDEN ON NONRESIDENTS, BY STATE OF RESIDENCE OF THE NONRESIDENT.

HYPOTHETICAL I:

A SINGLE INDIVIDUAL WITH NO DEPENDENTS EARNED $8,000.00 IN WAGES IN NEW HAMPSHIRE IN 1970, HAD NO OTHER INCOME, AND DID NOT ITEMIZE DEDUCTIONS.

A. **His state of residence is Maine.**

(1) His Maine taxes if the income had been earned in Maine, with computations and statutes cited:

Income:	$8,000.00	INT. REV. CODE of 1954, §§61, 62 ME. REV. STAT. ANN. t. 36, §5121 (1969)

Standard Deduction:	$800.00	§5124
Exemptions:	$1,000.00	§5126
Income Subject to Tax:	$6,200.00	
Tax:	$116.00	§5111

(2) His New Hampshire tax is computed as follows, ignoring the Maine tax:

N.H. Derived Income:	$8,000.00	N.H.R.S.A. ch. 77-B, §1(X) (1970)
Exemption:	$2,000.00	§2(II)
Taxable Income:	$6,000.00	
Tax:	$240.00	§2(II)

(3) Conclusion: Since his Maine tax on the same income would be only $116.00, the New Hampshire tax is $116.00, and by virtue of ME. REV. STAT. ANN. t. 36, §5127, no tax is paid to Maine.

B. **His state of residence is Massachusetts.**

(1) His Massachusetts tax, if the income had been earned in Massachusetts, with computations and statutes cited:

Income:	$8,000.00	MASS. GEN. LAWS ch. 62, §6 (1969)
Exemptions:	$2,000.00	§5B [now §3(B) (b)]
Net Taxable Income:	$6,000.00	
Tax:	$240.00	§5(b)

(2) New Hampshire tax computation, ignoring Massachusetts tax:
Same as A(2), above: Tax = $240.00

(3) Conclusion: The New Hampshire tax is $240.00, and by virtue of the credit under MASS. GEN. LAWS ch. 62, §6, the resident pays $240.00 — $240.00, or $00.00 to Massachusetts.

C. **His state of residence is Vermont.**

(1) His Vermont tax, if the income had been earned in Vermont, with computations and statutes cited:

Federal adjusted gross income:	$8,000.00	INT. REV. CODE of 1954, §§61, 62
Standard deduction:	$800.00	§141
Personal exemption:	$625.00	Act of Dec. 30, 1969, P.L. No. 91-172, §801, 83 Stat. 487, 675
Taxable income:	$6,575.00	§63
Federal tax:	$1,273.75	Act of Feb. 26, 1964, P.L. No. 88-272, §111(a), 78 Stat. 19
Surtax:	$32.00	Act of Dec. 30, 1969, P.L. No. 91-172, §701(a) (1), 83, Stat. 487
Federal income tax liability:	$1,305.75	
Vermont tax: 28.75%	$375.40	25% of federal tax liability from: VT. STAT. ANN. t. 32, §5822 (1970) 15% surtax from §5830

(2) New Hampshire tax computation, ignoring Vermont tax:

Same as A(2) above: Tax = $240.00

(3) Conclusion: The New Hampshire tax is $240.00, and by virtue of the credit under VT. STAT. ANN. t. 32, §5825, the resident pays $375.00 — $240.00, or $135.40 to Vermont.

D. **His state of residence is New Hampshire — No Tax.**

CONCLUSION OF HYPOTHETICAL I:

The Maine resident pays New Hampshire $116.00, the Massachusetts resident pays New Hampshire $240.00, the Vermont resident pays New Hampshire $240.00, and the New Hampshire resident pays New Hampshire nothing in income tax, *even though their incomes were identical.*

HYPOTHETICAL II:

A MARRIED INDIVIDUAL WITH TWO CHILDREN, THUS WITH THREE DEPENDENTS AND FILING A JOINT RETURN, EARNED $8,000.00 IN WAGES IN NEW HAMPSHIRE IN 1970, HAD NO OTHER INCOME, AND DID NOT ITEMIZE DEDUCTIONS.

Statutes are the same as those cited for the examples above, with additional sections noted where necessary.

W. **His state of residence is Maine.**

(1) Maine tax computation similar to A(1) above:

Standard deduction:	$800.00	
Exemptions: 4 x $1000.00 =	$4,000.00	
Income Subject to Tax:	$3,200.00	(one half is $1,600.00)
Tax:	$32.00	§5113

(2) New Hampshire tax computation identical to A(2) above:

Tax: $240.00

(3) Conclusion: The Maine resident pays $32.00 to New Hampshire, nothing to Maine.

X. **His residence is Massachusetts.**

(1) Massachusetts tax computation similar to B(1) above:

Exemptions: $3,800.00 ($2,600.00 + $600.00 + $600.00)

Net Taxable Income: $4,200.00

Tax: $168.00

(2) New Hampshire tax computation identical to A(2) above:

Tax: $240.00

(3) Conclusion: The Massachusetts resident pays $168.00 to New Hampshire, nothing to Massachusetts.

Y. **His state of residence is Vermont.**

(1) Vermont tax computation similar to C(1) above:

Federal Tax Basis:

Personal exemptions: $2,500.00 (4 x $625.00)

Taxable income: $4,700.00

Federal tax: $753.00

Surtax: $19.00

Federal income tax liability: $772.00

Vermont tax (28.75%): $221.95

(2) New Hampshire tax computation identical to A(2) above:

Tax = $240.00

(3) Conclusion: The Vermont resident pays $221.95 to New Hampshire, nothing to Vermont.

Z. **His state of residence is New Hampshire — No Tax.**

CONCLUSION OF HYPOTHETICAL II:

The Maine resident pays New Hampshire $32.00, the Massachusetts resident pays New Hampshire $168.00, the Vermont resident pays New Hampshire $221.95, and the New Hampshire resident pays New Hampshire nothing in income tax, *even though their incomes were identical.*

Supreme Court, U. S.
FILED
JAN 3 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2060

CARL M. AUSTIN, *et al.*,

Appellants,

v.

STATE OF NEW HAMPSHIRE, *et al.*,

Appellees.

On Appeal from the Supreme Court of the State of New Hampshire

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF NEW JERSEY

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IN THE

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On Appeal from the Supreme Court of the State of New Hampshire

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF NEW JERSEY

Interest of the Amicus

In 1961 the State of New Jersey enacted the Emergency Transportation Tax Act (N.J.S.A. 54:8A-1 *et seq.*). This law imposes an emergency tax for a limited period (which has subsequently been extended for another specific period) for transportation purposes. The tax is measured by certain income and gains derived by residents of New Jersey from sources within another State with respect to which there is a "critical transportation problem" inter-

state and by residents of such other State from sources within New Jersey. New Jersey residents are given a credit against the New Jersey tax for income taxes paid to the other "critical transportation problem" State.* All of the Emergency Transportation Tax Revenues are paid into a special transportation fund which is used exclusively to finance projects and programs to help relieve the transportation problems between New Jersey and the other State.

Another transportation tax, the Transportation Benefits Tax, was enacted in 1971 (N.J.S.A. 54:8A-58 *et seq.*). This tax is similar in most respects to the Emergency Transportation Tax. However, the amount of the tax differs and it is restricted to those "severe transportation problem" areas involving 100,000,000 to 300,000,000 interstate crossings annually by commuters between New Jersey and another State.

A "critical transportation problem" has been found to exist in the New Jersey-New York area and accordingly, the Emergency Transportation Tax has been applied to those persons who commute to work between those two States.** The special transportation fund resulting from

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* Non-residents are also given a credit against the tax for income taxes paid to their State of residence if that State provides a similar credit against its income tax to New Jersey residents who work in that State.

** The New York State Income Tax Law previously permitted a credit against the tax for income taxes paid by non-residents. Immediately after the enactment of the Emergency Transportation Tax Act in 1961, which permitted a similar tax credit for taxes paid by non-residents who work in New Jersey, only New Jersey residents had to pay the New Jersey Emergency Transportation Tax. However, shortly after the passage of the New Jersey tax, New York amended its law to allow the tax credit only to New York residents. The New Jersey tax credit for non-residents was then changed to the reciprocal form reflected in the previous footnote.

the Emergency Transportation Tax has been expended upon projects to alleviate this transportation problem. Similarly, a "severe transportation problem" has been found to exist in the New Jersey-Pennsylvania area requiring the imposition of the Transportation Benefits Tax. Likewise, the receipts from the Transportation Benefits Tax have been used to help relieve the interstate transportation problems between New Jersey and Pennsylvania.

The transportation taxes imposed by New Jersey thus differ from the New Hampshire income tax involved in the present matter since the revenues from the New Jersey taxes are used solely to alleviate transportation problems encountered by the interstate commuters while the New Hampshire tax revenues are not so dedicated. Also, each of the New Jersey taxes has a uniform tax rate. Nevertheless, the New Jersey and New Hampshire taxes are similar insofar as the tax revenues are derived solely from non-residents because each of the taxing statutes permit residents a credit for income taxes paid to the State wherein such persons work. Non-residents who work in New Jersey and New Hampshire do not receive such a credit for income taxes they pay to the State in which they reside.* Since the New Jersey and New Hampshire tax rates are identical to the tax rates of the States wherein such residents work, therefore, the residents of New Jersey and New Hampshire receive a full credit against any taxes due to their States of residence.

Because the revenue of the New Jersey transportation taxes is derived from non-residents who work in the State, and thus is similar to the source of the funds of the New Hampshire income tax, the State of New Jersey is filing this *amicus curiae* brief.

---

* This is similar to the income tax treatment afforded non-residents by the States surrounding New Jersey and New Hampshire.

ARGUMENT

POINT I

The appeal should be dismissed for want of jurisdiction because the appellants have not shown sufficient injury to establish a "case" or "controversy" under the United States Constitution.

Article III, Section 2, of the United States Constitution expressly provides that the judicial power of the constitutional courts of the United States is limited to "cases" and "controversies". In determining whether a "case" or "controversy" is presented by a taxpayer who alleges the unconstitutionality of a state taxation statute, this Court has uniformly held that the taxpayer must show a direct injury from the application of the tax in question.* As noted in *Doremus* v. *Board of Education of Hawthorne,* 342 U. S. 429 (1952):

> "Without disparaging the availability of the remedy by taxpayer's action to restrain unconstitutional acts which result in direct pecuniary injury, we reiterate what the Court said of a federal statute as equally true when a state Act is assailed: 'The par-

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* Notwithstanding that a complainant possesses sufficient interest to institute a suit in a State court, his standing to litigate an appeal in a federal court poses a separate issue to be resolved independently of the State requirements. As stated in *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 282-283 (1961):

> "Whether the appellant has standing to attack the state statute in this Court is, however, a separate issue, to which we must bring our independent judgment. [cases cited] The controlling question is whether the appellant 'has sustained or is immediately in danger of sustaining some direct injury as the result of [the statute's] enforcement . . .'"

ty who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.'

* * *

"We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of 'case or controversy,' we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such.

The taxpayer's action can meet this test, but only when it is a good-faith pocketbook action.

* * *

"It is not a question of motivation but of possession of the requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct." 342 U. S. 434-435.

In the present case, the appellants have not shown that they are in any way injured by the application of the New Hampshire Commuters Income Tax. They admit, in Point III of their brief, that as Maine residents they receive a tax credit from the State of Maine for the Commuters Income Tax paid the State of New Hampshire. As noted by the New Hampshire Supreme Court:

"Since these plaintiffs pay no greater tax by reason of the New Hampshire tax than they would otherwise pay to Maine, they are not prejudiced

by the Commuters Income Tax." *Austin et al.* v. *State Tax Commission*, 316 A. 2d 165, 167 (1974).

Appellants' real discontent is found in the last sentence of Point III of their brief: "Tax dollars are being collected and diverted from the appellants' domiciliary state . . ." However, this certainly is not a direct injury to the appellants, but rather is a matter which should be raised by the State of Maine.* Significantly, Maine *does* assert in its *amicus* brief that Maine (*not the appellants*) would receive $400,000 additional revenue if the New Hampshire tax were eliminated. In other words, the gain which may result from the elimination of the New Hampshire tax would inure to the benefit of the surrounding *States*, such as Maine and Vermont, and would not result in a direct lowering of the taxes to *individual taxpayers*.**

In its *amicus* brief, Maine and Vermont rely upon *Flast* v. *Cohen*, 392 U. S. 83 (1968) in an attempt to show that appellants have standing to challenge the New Hampshire tax as a "taxpayers suit". But, the *Flast* decision notes the requirement of a nexus between the taxpayer's status and the precise nature of the constitutional infringement

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* Even though the States of Maine and Vermont filed an *amicus* brief in this Court, they are not direct parties to the action.

** Maine attempts to allocate the $400,000 State gain to the appellants by dividing this figure among *all Maine* taxpayers (not only those Maine taxpayers working in New Hampshire) and arrives at a 40¢ average taxpayer amount. The necessity to utilize *all Maine* taxpayers in the computation, and not merely those Maine residents who work in New Hampshire, graphically illustrates that it is the State of Maine that is harmed by the New Hampshire tax and not the Maine residents who work in New Hampshire, such as the appellants, who will still pay the same amount of tax if the New Hampshire tax is eliminated—albeit to Maine instead of New Hampshire.

alleged. It is asserted at pages 8 and 9 of the *amicus* brief that appellants meet this requirement since their "status as taxpayers is closely related to the constitutional infringement in issue." However, unlike the appellants in *Flast* who were directly injured by the alleged establishment of religion violation, the appellants in the present case are not directly harmed by the alleged constitutional defects of the New Hampshire tax law. Rather, it is the other States, such as Maine and Vermont, which would be harmed by any constitutional defects since they suffer the revenue loss. As a matter of fact, in the *Flast* opinion the Court noted this distinction between the interests of the taxpayers and the states when it discussed *Frothingham* v. *Mellon*, 262 U. S. 447 (1923):

> "In essence, Mrs. Frothingham was attempting to assert the States' interest in their legislative prerogatives and not a federal taxpayer's interest in being free of taxing and spending in contravention of specific constitutional limitations imposed upon Congress' taxing and spending power." 392 U. S. at 105.

The appellants in the present case are like Mrs. Frothingham (who did not have the requisite standing) since they cannot show direct injury without referring to the interest of the State of Maine.

Both appellants and *amicus* cite *Allied Stores of Ohio* v. *Bowers*, 358 U. S. 522 (1959) in support of their contention that it is unnecessary to show that appellants will benefit by having the New Hampshire law declared unconstitutional. However, even though the appellant in *Allied Stores* was not itself covered by the tax exemption in question, nevertheless the tax exemption permitted out-of-state competitors to operate warehouses in Ohio with-

out being subject to the Ohio tax. Thus the appellant did have a direct pecuniary interest in challenging the Ohio tax exemption.

Finally, in a vain attempt to discover some "harm" to the appellants, the *amicus* brief refers to the withholding rate of the New Hampshire tax and alleges that because of the difference between that rate and the withholding rate of the Maine tax, the appellants are injured. However, the *amicus* brief later correctly admits (at page 14) that "the mere act of withholding might well not constitute legal harm in most tax schemes" citing *Travis* v. *Yale & Towne Manufacturing Co.*, 252 U.S. 60, 77 (1920).

In summary, because appellants have not shown that they are injured or harmed by the operation of the New Hampshire Commuters Income Tax Law, they have not presented a substantial justiciable "case" or "controversy" as required by the United States Constitution.

POINT II

The New Hampshire Commuters Income Tax is not violative of the privileges and immunities or equal protection clauses of the United States Constitution because it does not subject appellants to any additional tax burden.

In determining whether a state taxing law contravenes rights secured by the Constitution, "the decision must depend not upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed." *Shaffer* v. *Carter*, 252 U.S. 37, 55 (1920). The same operational factors of the New Hampsire Commuters Income Tax which demonstrate appellants' lack of standing also show that the tax does not

violate their rights under either the privileges and immunities clause in Article IV, Section 2, of the Constitution or the equal protection clause in the Fourteenth Amendment to the Constitution.

The object of the privileges and immunities clause is "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Paul* v. *Virginia*, 75 U.S. 168, 180 (1868). In its actual operation, the New Hampshire tax in no way places non-residents of New Hampshire, such as appellants, at a disadvantage vis-a-vis New Hampshire residents. The non-residents are subjected to tax by their states of residence (such as Maine) upon all their income prior to their entry into New Hampshire. Thus any difference in tax treatment between New Hampshire residents and non-residents arises *not* by virtue of the New Hampshire tax, but rather by the imposition of income taxes by the states surrounding New Hampshire. Even if New Hampshire did not have a commuters tax, there would be a difference in tax treatment between New Hampshire residents and non-New Hampshire residents working in the state, caused by the income taxes of the other states imposed upon their residents who work in New Hampshire. The New Hampshire tax merely directs the tax to the state of employment (i.e., New Hampshire) and certainly does not affect the amount of tax to be paid by the non-residents since their tax liability remains unchanged whether or not the New Hampshire tax is imposed.

Contrary to the present situation, in each of the cases involving the privileges and immunities clause cited by the appellants and the States of Maine and Vermont, the challengers were both directly disadvantaged by the law in question, and would have had that disadvantage removed had the law been held to be invalid. For instance, in

Toomer v. *Witsell*, 334 U.S. 385 (1948), the non-residents were disadvantaged because they had to pay a license fee of $2,500 for each shrimp boat which they owned while residents had to pay only $25. Likewise, in *Ward* v. *Maryland*, 79 U.S. 418 (1870) non-residents were disadvantaged by having to pay $300 for a trader's license while residents paid between $12 and $15. However, in the present case, the appellants are not disadvantaged by the New Hampshire law since their tax liability would be the same even without such law. Any disadvantage which they might be subjected to is by virtue of the tax imposed by their state of residence. Therefore, the New Hampshire tax is not violative of their privileges and immunities.

For similar reasons the New Hampshire law does not deny the appellants' equal protection of the law. The relationship of the equal protection clause to tax statutes was summarized in *Chalker* v. *Birmingham & N.W. Ry. Co.*, 249 U.S. 522, 526-527 (1919):

> "The power of a state to make reasonable and natural classifications for purposes of taxation is clear and not questioned; but neither under form of classification nor otherwise can any state enforce taxing laws which in their practical operation materially abridge or impair the equality of commercial privileges secured by the Federal Constitution to citizens of the several States."

The New Hampshire tax does not impose a greater burden upon non-residents than would exist without the tax since non-residents are subjected to tax by their states of residence upon their entire income earned in New Hampshire. The tax burden upon non-residents has thus not been changed by the New Hampshire tax and, therefore, no abridgement or impairment of their commercial privileges has occurred.

The equal protection cases included in the briefs of appellants and the states of Maine and Vermont all refer to situations where the person instituting the action was subjected to a greater tax burden as a result of the law involved and such person would have been relieved of that greater burden if the law were invalidated. For example, in *Louisville Gas & Electric Co. v. Coleman*, 277 U. S. 32 (1928), the appellant was denied a recording tax exemption because of the duration of the obligation it sought to record. Upon the finding that the law was unconstitutional due to its unreasonable classification, appellant's greater tax burden was eliminated. Similarly, in *F.S. Royster Guano Co. v. Virginia*, 253 U. S. 412 (1920), the appellant was denied a tax exemption afforded corporations deriving income from outside the State. After the law was held to violate the equal protection of the laws, the appellant's tax liability was lowered.

However, in the case *sub judice*, the appellants are not subjected to any greater tax than if there were no New Hampshire tax and thus their tax liability would not be reduced if the tax were eliminated. Consequently, there has been no violation of their right to the equal protection of the laws.

Although the appellants cannot show that they pay any greater tax because of the New Hampshire law, nevertheless they refer to the revenue loss of the State of Maine.* However, it is only because of the action of the states surrounding New Hampshire (such as Maine) that a disparity of tax treatment arises. Each of these states

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*A state is not a "person" entitled to the equal protection of the laws of the Fourteenth Amendment, *Wisconsin v. Zimmerman*, 205 F. Supp. 673 (W.D.Wisc. 1962), nor a "citizen" entitled to the rights of the privileges and immunities clause, *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Paul v. Virginia*, 75 U.S. 168 (1868).

imposes its tax upon the income earned by New Hampshire residents who work in such states, thereby causing a dissimilar tax treatment of New Hampshire residents. New Hampshire is thus given reason for imposing its tax upon residents of that State who work in New Hampshire.

Although imposing income taxes on non-residents appears to be unfair since the non-residents are not given the same benefits as residents (*e.g.* the right to attend public schools and colleges, borrow books from the public libraries, etc.), nevertheless it is important to note that it was *not* New Hampshire that first imposed its income tax on non-residents, but rather it was the surrounding states that imposed their income taxes on New Hampshire residents. Similarly, New Jersey, which has large numbers of its residents commuting to work in New York and Pennsylvania, did not first enact a tax on non-residents, but rather was forced to tax non-residents by the action of its surrounding states which imposed taxes on New Jersey residents. Naturally, New Jersey would rather that each state tax only its own residents since such procedure would not only be fairer to the residents of the State, but also because it is questionable whether the commuter is actually a net burden to the other state.

Significantly, if a surrounding state agrees not to tax New Hampshire residents working in that State, the New Hampshire tax commission is empowered to enter into a reciprocal arrangement not to tax the residents of that State who work in New Hampshire. See New Hampshire R.S.A. 77-B:6.* Therefore any revenue loss to the states

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* The New Jersey tax laws also provide for reciprocity between states. See, e.g., N.J.S.A. 54:8A-16(A). As a matter of fact, when the New Jersey law was first enacted, it was only imposed upon New Jersey residents who worked in New York, and New Yorkers working in New Jersey were given a non-resident credit. However, New York then decided to amend its law so as to refuse tax credits to New Jersey residents working in New York, thereby subjecting such persons to the New York tax. The New Jersey law was changed accordingly.

surrounding New Hampshire is caused by the refusal of such states to enter into reciprocal agreement to tax only the residents of such state, thus permitting the tax revenue of non-residents working in such state to revert to the state where such workers reside. The taxes imposed by New Hampshire and New Jersey thus have a similar effect as the New Jersey Counterpart Fee Act, which imposes a tax upon trucking companies using New Jersey roads at the same rate as taxes imposed by the state where such trucks are registered or based, *i.e.* to encourage other states to enter into reciprocal agreements to tax only residents of that state. The constitutionality of this tax was recently upheld in *B & L Motor Freight* v. *Heymann*, 120 N. J. Super. 270, 293 A. 2d 711 (Ch. Div. 1972), aff'd 125 N. J. Super. 372, 311 A. 2d 184 (App. Div. 1973), certification denied 64 N. J. 494, 317 A. 2d 707 (1974), appeal dismissed for want of a substantial federal question —— U. S. —— (1974), 43 Law Week 3326.

As noted above, the New Hampshire tax does not impose any additional tax burden upon the non-residents. However, even if it did, as long as the tax burden is not unreasonable as compared to residents, the tax is valid. For example, in *Travelers' Insurance Co.* v. *Connecticut*, 185 U.S. 364 (1902), the Court upheld a state tax which permitted residents a deduction, but denied such deduction to non-residents, because the non-residents were not burdened by certain other local taxes. Similarly, in *General American Tank Car Corporation* v. *Day*, 270 U.S. 367 (1926), the Court affirmed the validity of a state tax imposed, in lieu of local taxes, on rolling stock owned by non-resident corporations, even though resident corporations were not subject to the tax. Again, the Court examined the relative tax burdens between the residents and non-residents in order to determine whether the tax was discriminatory. More recently, in *Consolidation Coal Co.* v.

Bailey, 467 F. 2d 1124 (3rd Cir. 1972) *cert.* den. 410 U.S. 930 (1973), a municipal ordinance imposing a tax on income earned within the municipality by non-resident workers was upheld.

In judging whether the non-residents were subjected to a reasonable tax burden,* the New Hampshire Supreme Court took into account the taxes paid by New Hampshire residents and non-residents and noted as follows:

> "A resident pays an unearned income tax, a $10 residence tax, and other taxes while the non-resident pays nothing for the state services which protect him and his employment unless by means of this tax which operates to produce a 'practical equality' by means of the power 'to equitably defray the expense of protecting the right of property and other rights'." 316 A. 2d 167.

Thus, the court from which this appeal has been taken expressly found that non-residents are not subjected to a disproportionate tax burden. In the absence of any contrary evidence in the record, this finding should be accepted by the Court.

In brief, the New Hampshire Commuters Income Tax is not unconstitutional since it does not impose any additional tax liability upon non-residents above the amount of tax due to their states of residence. Moreover, even if it did, it is not an unreasonable tax burden compared to the taxes imposed upon New Hampshire residents.

---

* It must be noted that the rate of tax is no higher than the taxes imposed by the surrounding states upon New Hampshire residents working in such other states.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the appeal should be dismissed for want of jurisdiction inasmuch as the appellants have not shown the injury required to establish a "case" or "controversy" under the United States Constitution. If this Court does find a "case" or "controversy" is presented, it is further respectfully submitted that the decision of the New Hampshire Supreme Court should be affirmed because the New Hampshire Commuters Income Tax is not violative of the privileges and immunities or equal protection clauses of the Constitution.

Respectfully submitted,

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OCTOBER TERM, 1974

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On Appeal from the Supreme
Court of the State of New Hampshire

BRIEF FOR THE APPELLEES

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Court of the State of New Hampshire

BRIEF FOR THE APPELLEES

OPINION BELOW

The Opinion of the Supreme Court of New Hampshire, dated February 28, 1974, is reported at 114 N.H. 137, 316 A. 2d 165 as *Carl M. Austin, et al* v. *State Tax Commission*, Merrimack No. 6641. It is included in Appendix B of Appellants' Jurisdictional Statement at pp. A4-A9.

JURISDICTION

The jurisdiction of this Court is set out in the Brief for the Appellant at p. 2. The State of New Hampshire filed a Motion to Dismiss on September 11, 1974, urging this Court to refuse jurisdiction for want of substantial federal question. On October 15, 1974, this Court noted probable jurisdiction.

QUESTIONS PRESENTED

The New Hampshire Commuters Income Tax reaches income of Maine residents earned in New Hampshire and, in concert with the Maine income Tax, diverts to New Hampshire an amount of tax which the Maine resident would otherwise be required to pay to Maine. New Hampshire residents, although taxed in various ways, do not pay a tax upon income earned in New Hampshire. The questions presented are:

1. Whether the operation of the New Hampshire Commuters Income Tax deprives the Appellants of rights secured to them by the Privileges and Immunites Clause of Article IV, § 2 of the United States Constitution.

2. Whether the operation of the New Hampshire Commuters Income Tax deprives the Appellants of rights secured to them by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

3. Whether the Appellants have standing to prosecute this appeal.

STATUTES INVOLVED

The statutes involved are New Hampshire Revised Statutes Annotated, Chapter 77-B (RSA 77-B) and Maine Revised Statutes Annotated, Title 36, Part 8, §§ 5111 and 5127. Relevant sections of both statutes are included as a Statutory Appendix to this brief.

STATEMENT

This case was brought by three residents of the State of Maine who were employed in the State of New Hampshire during the taxable year 1970. Pursuant to New Hampshire Revised Statutes Annotated [RSA] 77-B, their employers withheld from their wages and salaries the amount of tax imposed upon their New Hampshire derived income as defined in RSA 77-B:1 (X).

The amount of tax so imposed by RSA 77-B:2 (II) was, under the provisions thereof, made equal to the amount of tax which would have been due the State of Maine under its income tax law had the income been earned in Maine.

Since the Maine tax law provides a credit against the Maine income tax for the amount of income subject to Maine tax which is also taxed by another jurisdiction, e.g., New Hampshire, the plaintiffs' tax-load was unaltered by the operation of RSA 77-B. Rather, that amount of tax was diverted to New Hampshire which would have been paid to Maine in the absence of the New Hampshire taxing statute.

The plaintiffs filed both New Hampshire and Maine tax returns for the year 1970. In December, 1971, the plaintiffs caused a petition for declaratory judgement to be filed. The defendant moved to dismiss, which motion was denied, exceptions noted, and all issues raised were transferred without ruling to the New Hampshire Supreme Court on September 20, 1972.

The New Hampshire Supreme Court issued a final judgement for the defendant declaring RSA 77-B to be not violative of either the privileges and immunities or equal protection clauses of the United States Constitution.

SUMMARY OF ARGUMENT

The New Hampshire Commuters Income Tax is specifically designed to fill a gap in the tax structure of that State, which structure does not include a broad-based income tax. New Hampshire taxes its citizens in various ways, and the Commuters Income Tax is intended to assess residents of other states who generate income in New Hampshire a fair share of the burden of supporting the government. That is done in a manner which does not alter the ultimate tax burden of the non-resident taxpayer, but merely diverts to

New Hampshire an amount which would otherwise be paid to the home state. The Appellees assert that the underlying lack of economic impact upon the Appellants results in a lack of standing in the Appellants to challenge the constitutionality of the tax, and further forecloses any claim by the Appellants of a denial of equal protection or of privileges and immunities, since they are not treated by New Hampshire in any different fashion than they would be by the State of Maine in the absence of the New Hampshire tax.

ARGUMENT

I

INTRODUCTION

This case has been brought to this Court by the Appellants, all residents and taxpayers of the State of Maine, upon a framing of issues which, understandably, suggests the result which they would have this Court reach. It shall be the underlying theme of this argument by the State of New Hampshire that the issues as framed by the Appellants do not comprehend the entire matter to be considered, and that the analysis given each of the questions presented must have as its premise that the Appellants suffer no cognizable injury as a result of the application to them of the Commuters Income Tax. That premise, which is itself a conclusion, is accordingly treated first, and separately, in the argument which follows.

II

THE APPELLANTS SUFFER NO INJURY AS A RESULT OF THE APPLICATION TO THEM OF THE COMMUTERS INCOME TAX

The taxing provision at issue in this case is RSA 77-B:2, which reads as follows:

Tax Imposed.

I. On residents, Income Earned Outside New Hampshire. A tax is hereby imposed upon every resident of the state,

which shall be levied, collected and paid annually at the rate of four percent of their income which is derived outside the state of New Hampshire as defined in RSA 77-B:1 "New Hampshire taxable income:" provided, however, that if such income shall be subject to a tax in the state in which it is derived, such tax shall constitute full satisfaction of the tax hereby imposed; and provided further, that if such income is exempt from taxation because of statutory or constitutional provisions in the state in which it is derived, or because the state in which it is derived does not impose an income tax on such income, it shall be exempt from taxation under this paragraph.

II. On Nonresidents. Income Earned in New Hampshire. A tax is hereby imposed upon every taxable nonresident, which shall be levied, collected and paid annually at the rate of four percent of their New Hampshire derived income as defined in RSA 77-B:1 less an exemption of two thousand dollars; provided, however, that if the tax hereby imposed exceeds the tax which would be imposed upon such income by the state of residence of the taxpayer, if such income were earned in such state, the tax hereby imposed shall be reduced to equal the tax which would be imposed by such other state.

III. Exception. Notwithstanding the provisions of paragraphs I and II, no tax shall be imposed upon salaries paid to men or women in the armed forces of the United States.

In order to assess the net impact of the above provision upon the Appellants, one must consider also the operation of the Maine Income Tax Law, Maine Revised Statutes Annotated, Title 36, Part 8, §5111 "Imposition and rate of tax" and §5127 "Credit for income tax paid to another state" (statutory appendix, p.15). The latter provision, in particular, provides in pertinent part that

> "a resident individual shall be allowed a credit against the tax otherwise due under this part for the amount of any income tax imposed on him for the taxable year by another state . . . on income derived from sources therein and which is also subject to tax under this part."

A. The Tax Imposed Creates a Classification of Property, not Taxpayers.

The Appellants profess to agree with the New Hampshire Supreme Court in the opinion below that the tax should be viewed "in terms of its practical effect and operation." (Brief for the Appellants, p. 9). In order to determine that practical effect, however, one must consider all of the provisions of the statute in order to understand fully the theory and intent of the legislature as evidenced by the statute.

A careful reading of RSA 77-B:2 (I) & (II) reveals that the initial, and most significant, classification created by that provision is that of *income earned outside the state of residence* as distinguished from income earned within the state of residence. The tax is *imposed* upon out-of-state income, without regard to whether the taxpayer is a resident or non-resident of New Hampshire. The rate of taxation is limited with respect to both residents and non-residents so that it does not exceed the rate imposed by the state of the non-resident. As to both resident and non-resident, the full amount of tax paid to the state in which the income is earned is allowed as a credit against the tax imposed by the state of residence. For New Hampshire residents this credit is built into RSA 77-B:2 (I); for Maine residents it is provided by § 5127, above quoted. In both cases a tax *is* imposed by the state in which the income is earned. Finally, and most significantly, the net change in the tax burden upon both residents and non-residents of New Hampshire is zero.

What the foregoing analysis reveals, we submit, is a balanced taxing provision which gives effect to a legislative policy determination that the state in which income is earned is the appropriate party to tax that income, so that it may be made to bear a ratable share of the expenses of government. *Shaffer* v. *Carter*, 252 U.S. 37, 53 (1920). Both New Hampshire and Maine subscribe to that policy in that they provide the credits above mentioned for taxes paid to the state in which income is earned. Not to be overlooked, also, is the fact that New Hampshire residents working in Maine are taxed by Maine (§ 5111, statutory appendix, p. 14) for no other discernable reason than to secure "a ratable contribution . . . for the support of the government." *Shaffer* v. *Carter*. *Id*

B. The Operation of the Withholding Provision Causes No Cognizable Injury.

It has been settled by this court that withholding provisions do not give rise to a constitutionally cognizable injury. *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S. 60, 76 (1920). *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U.S. 232, 236. Neither the Appellants nor the States of Maine and Vermont, *Amici Curiae*, have cited any authority or adduced any compelling argument to the contrary.

C. Loss of Revenue in Bulk by State of Maine Causes No Specific Injury To Appellants.

It may be taken as given that the Commuters Income Tax, in conjunction with the Maine Income Tax provisions, results in a diversion to New Hampshire of tax revenue otherwise available to Maine.

The State of Maine has presented figures to show that each Maine resident is injured in the average amount of $.40 by that diversion. These calculations are not a part of the record in this appeal, and have never been subjected to judicial scrutiny. To the extent that they are accurate, however, they tend to show that the impact of the Commuters Income Tax upon the Appellants is indeed *de minimis*.

III

THE APPELLANTS LACK STANDING TO PROSECUTE THIS APPEAL

The question of standing is one for this Court to resolve regardless of the position taken by the court below. This Court may find standing where it was denied below, *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522 (1959); or deny standing where granted below. *Doremus* v. *Board of Education*, 342 U.S. 429 (1952).

The Appellants do not treat the standing issue at length, but seem to rely upon *Allied Stores*, *supra* to settle the question (Brief for the Appellants, p. 18). We submit that *Allied Stores* is not at all compelling on the issue of standing, since the opinion below turned primarily upon the capacity to provide meaningful relief, and none of the parties seems to

have challenged Allied's claim of economic injury. The contrary obtains here, since the Appellees assert that the Appellants have suffered no harm, a proposition with which *Allied Stores* did not deal.

The State of Maine, however, approaches the standing issue on behalf of the Appellants, and relies primarily upon *Flast v. Cohen*, 392 U.S. 83 (1968). As we noted in our argument relative to injury, above, the matters adduced by the State of Maine with regard to the economic impact of the Commuters Income Tax are not of record. This much may be said, however: since the economic impact of the diversion of revenue falls *first* upon the State of Maine, the State of Maine is the proper party to litigate any injuries claimed to result therefrom. This Court should not permit the Appellants here to litigate the rights of absent third parties. *Flast* v. *Cohen*, *Id.*, n. 20; *Heald* v. *District of Columbia*, 259 U.S. 114 (1922). Exceptions to this principle have been created only where compelling First Amendment rights are at stake. See *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965).

Furthermore, we submit that Maine's reliance upon the "automatic standing" of *Flast* is misplaced. *Flast*, and the principles upon which it departed from the long-established rule of *Frothingham* v. *Mellon*, 262 U.S. 447 (1923), involve challenges to the exercise of congressional power under the taxing and spending claims of Art. I, §8, of the Constitution. The result in *Flast*, we submit, turned upon a perceived need for a liberalized taxpayer standing rule to provide a sufficient group of potential litigants positioned to challenge federal spending legislation where appropriate. This Court said, in outlining the first part of the two-part rule, that the "nexus" required between the taxpayer and the federal statute is "consistent with the limitation imposed upon state-taxpayer standing in federal courts in *Doremus* v. *Board of Education*, 342 U.S. 429 (1952).

The *Flast* and *Doremus* decisions, read together, do not create the "automatic standing" for a taxpayer urged by the State of Maine (Brief of States of Maine and Vermont, p. 5). Rather, the Court in *Doremus* quoted from *Massachusetts* v. *Mellon*, 262 U.S. 447, 488 (1923):

> "The party who invokes the power must be able to show not only that the statute is invalid but that he has

sustained . . . some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

342 U.S. at 434

The Appellants herein do not, we submit, meet the test for state-taxpayer standing set out in *Doremus* and *Flast*, and they should not be allowed to litigate the rights of the State of Maine. See also *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 282-3 (1961).

IV

THE COMMUTERS INCOME TAX IS NOT VIOLATIVE OF EITHER EQUAL PROTECTION OR PRIVILEGES AND IMMUNITIES PROVISIONS OF THE THE UNITED STATES CONSTITUTION

We have examined at some length the reasons why the Appellants have no cognizable injury from the application to them of the Commuters Income Tax. The same reasons and lack of injury are the basis for our submitting that there is no deprivation of constitutional rights effected by the New Hampshire Tax. It is our position that the cases of *Shaffer* v. *Carter*, 252 U.S. 37 (1920), and, by negative implication, *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920), are dispositive of this appeal on the issue of privileges and immunities.

The taxation by a state of non-residents, *per se* involves no violation of the privileges and immunities clause of the Federal Constitution. *Shaffer* v. *Carter*, Id. In that case it was said:

That a State, consistently with the Federal Constitution, may not prohibit the citizens of other States from carrying on legitimate business within its borders like its own citizens, of course is granted: but it does not follow that the business of non-residents may not be required to make a ratable contribution in taxes for the support of the government. On the contrary, the very fact that a citizen of one State has the right to hold property or carry on an occupation or business in another is a very

reasonable ground for subjecting such non-resident, although not personally yet to the extent of his property held, or his occupation or business carried on therein, to a duty to pay taxes not more onerous in effect than those imposed under like circumstances upon citizens of the latter State.

The key phrase here is "not more onerous in effect. . . ." So long as the ultimate burden upon residents and non-residents is substantially unaltered by the incidence of the tax, there is no constitutional infirmity. *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S. 60, 40 S. Ct. 228 (1920), relied upon by the appellants, is not compelling here. The New York income tax law under consideration in that case had the unavoidable effect of increasing the total tax burden of the non-residents to which it applied, since the neighboring States of New Jersey and Connecticut had no income tax in effect, and at the same time providing that that increase in tax burden should be greater for non-residents than for residents. The New York law was accordingly held to violate the privileges and immunities clause of the Federal Constitution. The balance of the opinion in *Travis* confirmed the principles enunciated in *Shaffer* v. *Carter*, *supra* and we submit that the decision in *Travis* marks the point at which the line ought to be drawn. Beyond that point there is no demonstrable injury, and the decision should be in favor of the statute.

The equal protection clause, in like manner, affords no grounds for attack upon RSA 77-B. The power to tax is an attribute of state sovereignty, and,

> "Although the wide discretion as to classification retained by a legislature often results in narrow distinction, these distinctions, if reasonably related to the object of the legislation, are sufficient to justify the classification." *German Alliance Ins. Co.* v. *Lewis*, 233 U.S. 389, 418, 34 S. Ct. 612 (1914).

Furthermore, the practical, rather than the theoretical, effect is the standard by which tax statutes are to be measured.

> "[t]he constitutional prohibition applies only to taxation which in fact bears unequally on persons or property of the same class and that mere differences in modes of assessment do not deny equal protection

unless they are shown to produce such inequality." *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U.S. 232, 236 (1890).

As noted in the opinion below, the source of revenue reached by RSA 77-B is, for lack of personal jurisdiction over non-residents, the only source available from which to assess and effect the "ratable contribution in taxes for the support of the government." *Shaffer* v. *Carter*, *supra*.

Contrary to the assertions of the Appellants, who are faced now with a record insufficient to support allegations of gross inequality of tax burden, we urge that this Court not change its long-standing rule that:

> . . .the presumption of constitutionality can be overcome by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."
>
> *Madden, Executor* v. *Kentucky*, 309 U.S. 83 (1940)

We respectfully submit that the Appellants have failed to carry that burden, and that the Judgement of the New Hampshire Supreme Court should be affirmed.

Respectively submitted,

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STATUTORY APPENDIX

NEW HAMPSHIRE
REVISED STATUTES ANNOTATED

Chapter 77-B
(as enacted by Chapter 20, Laws of 1970 and amended by Chapter 57, Laws of 1970)

Commuters Income Tax

77-B:1 Definitions. As used in this chapter the following terms shall have the following meanings unless the context clearly requires otherwise:

I. "Adjusted gross income" shall mean, for any taxable year, the adjusted gross income as defined in the United States internal revenue code in effect for that taxable year but excluding income which under the code is exempted from taxation by the state.

• • •

VI. "New Hampshire taxable income" shall mean, for any taxable year, taxable income as defined under the United States internal revenue code in effect for that taxable year less any New Hampshire derived income, less an exemption of two thousand dollars and less any taxable business profits taxed pursuant to the business profits tax.

• • •

X. "New Hampshire derived income" shall mean, for any taxable year:

(a) rents, royalties and gain derived from the ownership of property within the state;

(b) wages, salaries, fees, commissions or other income received with respect to personal services performed of whatever kind and in whatever form paid derived from activities (1) performed within this state, or (2) performed from a base of operations within this state and not subject to an income tax within the state where the services are performed.

(c) income derived from every business, trade, occupation or profession of the taxpayer to the extent that the business, trade, occupation or profession is carried on within the state. But New Hampshire derived income shall not include any income excluded from adjusted gross income as defined in this section nor any taxable business profits taxed pursuant to the business profits tax.

XI. "Resident" shall mean:

(a) an individual domiciled in the state except one who maintains a permanent place of abode outside the state, does not maintain one within the state and does not spend more than thirty days of the taxable year within the state; or

(b) an individual who maintains a permanent place of abode within the state and spends more than one hundred eighty-three days of the taxable year within the state.

XII. For the purposes of this act, interest, dividends and capital gains received by the taxpayer from the ownership or sale of stock or from a beneficial interest in a trust and all income received by the taxpayer from a retirement system of any kind or from an annuity or other insurance plan shall be deemed to have been earned in the state of residence of said taxpayer.

77-B:2 Tax Imposed.

I. On Residents, Income Earned Outside New Hampshire. A tax is hereby imposed upon every resident of the state, which shall be levied, collected and paid annually at the rate of four percent of their income which is derived outside the state of New Hampshire as defined in RSA 77-B:1 "New Hampshire taxable income;" provided, however, that if such income shall be subject to a tax in the state in which it is derived, such tax shall constitute full satisfaction of the tax hereby imposed; and provided further, that if such income is exempt from taxation because of statutory or constitutional provisions in the state in which it is derived, or because the state in which it is derived does not impose an income tax on such income, it shall be exempt from taxation under this paragraph.

II. On Nonresidents, Income Earned in New Hampshire. A

tax is hereby imposed upon every taxable nonresident, which shall be levied, collected and paid annually at the rate of four percent of their New Hampshire derived income as defined in RSA 77-B:1 less an exemption of two thousand dollars; provided, however, that if the tax hereby imposed exceeds the tax which would be imposed upon such income by the state of residence of the taxpayer, if such income were earned in such state, the tax hereby imposed shall be reduced to equal the tax which would be imposed by such other state.

III. Exception. Notwithstanding the provisions of paragraphs I and II, no tax shall be imposed upon salaries paid to men or women in the armed forces of the United States.

MAINE REVISED STATUTES ANNOTATED

TITLE 36, PART 8

§ 5111. Imposition and rate of tax

A tax is hereby imposed for each taxable year on the entire taxable income of every resident individual of this State and on the taxable income of every non-resident individual which is derived from sources within this State. The amount of the tax shall be determined in accordance with the following table:

If the taxable income is:	The tax is:
Not over $2,000	1% of the taxable
$2,000 but not over $5,000	$20 plus 2% of income excess over $2,000
$5,000 but not over $10,000	$80 plus 3% of excess over $5,000
$10,000 but not over $25,000	$230 plus 4% of excess over $10,000
$25,000 but not over $50,000	$830 plus 5% of excess over $25,000
$50,000 or more	$2,080 plus 6% of excess over $50,00

• • • •

§ 5127. Credit for income tax paid to another state

1. Resident individual. A resident individual shall be allowed a credit against the tax otherwise due under this part for the amount of any income tax imposed on him for the taxable year by another state of the United States or a political subdivision thereof or the District of Columbia on income derived from sources therein and which is also subject to tax under this part.

2. Limitation on credit. The credit provided under this section shall not exceed the proportion of the tax otherwise due under this part that the amount of the taxpayer's adjusted gross income derived from souces in the other taxing jurisdiction bears to his entire adjusted gross income as modified by this part.

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

AUSTIN ET AL. *v.* NEW HAMPSHIRE ET AL.

APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

No. 73–2060. Argued January 15, 1975—Decided March 19, 1975

The New Hampshire Commuters Income Tax imposes a tax on nonresidents' New Hampshire-derived income above $2,000 at a 4% rate, except that if the nonresident's State of residence would impose a lesser tax had the income been earned in that State, the New Hampshire tax is reduced to that amount. The Commuters Income Tax contains provisions that in practical effect exempt from tax income earned by New Hampshire residents outside the State, and New Hampshire imposes no tax on its residents' domestic earned income. *Held:* Under the rule requiring substantial equality of treatment for the citizens of the taxing State and nonresident taxpayers, the New Hampshire Commuters Income Tax violates the Privileges and Immunities Clause, since the tax falls exclusively on nonresidents' incomes and is not offset even approximately by other taxes imposed upon residents alone. Pp. 9–11.

(a) The State's contention that the tax's ultimate burden is not in effect more onerous on nonresidents because their total tax liability is unchanged once the tax credit received from their State of residence is taken into account, cannot be squared with the underlying policy of comity that the Privileges and Immunities Clause requires. P. 9.

(b) The possibility that in this case Maine, the appellant taxpayers' State of residence, could shield its residents from the New Hampshire tax by amending its credit provisions does not cure but in fact compounds the constitutional defect of the discrimination in the New Hampshire tax, since New Hampshire in effect invites appellants to induce their representatives to retaliate against such discrimination. The constitutionality of one State's statutes affecting nonresidents cannot depend upon the present configuration of another State's statutes. Pp. 10–11.

114 N. H. 137, 316 A. 2d 165, reversed.

Syllabus

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a dissenting opinion. DOUGLAS, J., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73-2060

Carl M. Austin et al., Appellants, *v.* State of New Hampshire et al. | On Appeal from the Supreme Court of New Hampshire.

[March 19, 1975]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Appellants are residents of Maine who were employed in New Hampshire during the 1970 tax year and as such were subject to the New Hampshire Commuters Income Tax. On behalf of themselves and others similarly situated, they petitioned the New Hampshire Superior Court for a declaration that the tax violates the Privileges and Immunities and Equal Protection Clauses of the Constitutions of New Hampshire and of the United States. The cause was transferred directly to the New Hampshire Supreme Court, which upheld the tax. 114 N. H. 137, 316 A. 2d 165 (1974). We noted probable jurisdiction of the federal constitutional claims, — U. S. — (Oct. 15, 1974), and on the basis of the Privileges and Immunities Clause of Art. IV, we now reverse.

I

The New Hampshire Commuters Income Tax imposes a tax on nonresidents' New Hampshire derived income in excess of $2,000.[1] The tax rate is 4% except that if the

[1] N. H. Rev. Stat. Ann. § 77-B:2 II provides:

"A tax is hereby imposed upon every taxable nonresident, which

nonresident taxpayer's state of residence would impose a lesser tax had the income been earned in that State, the New Hampshire tax is reduced to the amount of the tax that the State of residence would impose. Employers are required to withhold 4% of the nonresident's income, however, even if his home State would tax him at less than the full 4%. Any excess tax withheld is refunded to the nonresident upon his filing a New Hampshire tax return after the close of the tax year showing that he is entitled to be taxed at a rate less than 4%.

The Commuter Income Tax initially imposes a tax of 4% as well on the income earned by New Hampshire residents outside the State. It then exempts such income from the tax, however, (1) if it is taxed by the State from which it is derived; (2) if it is exempted from taxation by the State from which it is derived; or (3) if the State from which it is derived does not tax such income.[2] The effect of these imposition and exemption features is

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shall be levied, collected and paid annually at the rate of four percent of their New Hampshire derived income . . . less an exemption of two thousand dollars; provided, however, that if the tax hereby imposed exceeds the tax which would be imposed upon such income by the state of residence of the taxpayer, if such income were earned in such state, the tax hereby imposed shall be reduced to equal the tax which would be imposed by such other state."

[2] N. H. Rev. Stat. Ann. § 77-B:2 I provides:

"A tax is hereby imposed upon every resident of the state, which shall be levied, collected and paid annually at the rate of four percent of their income which is derived outside the state of New Hampshire . . . ; provided, however, that if such income shall be subject to a tax in the state in which it is derived, such tax shall constitute full satisfaction of the tax hereby imposed; and provided further, that if such income is exempt from taxation because of statutory or constitutional provisions in the state in which it is derived, or because the state in which it is derived does not impose an income tax on such income, it shall be exempt from taxation under this paragraph."

that no resident of New Hampshire is taxed on his foreign income. Nor is the domestic earned income of New Hampshire residents taxed. In effect, then, the State taxes only the incomes of nonresidents working in New Hampshire;[3] it is on the basis of this disparate treatment of residents and nonresidents that appellants challenge New Hampshire's right to tax their incomes from employment in that State.[4]

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[3] New Hampshire residents pay a 4.5% tax on interest (other than interest on notes and bonds of the State and on bank deposits) and dividends (other than cash dividends on stock in national banks and New Hampshire banks and thrift institutions) in excess of $600. N. H. Rev. Stat. Ann. §§ 77:1–5. Residents also pay a $10 annual "resident tax" for the use of their town or city of residence. N. H. Rev. Stat. Ann. §§ 72:1, 5a. Other state taxes, such as those on business profits, real estate transfers, and property, are paid by residents and nonresidents alike.

State income tax revenues from the tax on residents' unearned income in fiscal year 1970 were $3,462,000. In fiscal year 1971, the first in which the State taxed the earned incomes of nonresidents, total income tax revenues rose to $5,238,000. U. S. Dept. of Commerce, Bureau of the Census, State Tax Collections in 1970 (Table 9) (Series GF70 No. 1); *id.*, 1971.

[4] Appellees challenge appellants' standing to maintain this action on the theory that their economic position was unchanged despite the imposition of the Commuter Income Tax because they received an offsetting credit under the tax laws of Maine, Me. Rev. Stat. Ann. Tit. 36, § 5127 (Supp. 1973), against income taxes owing to that State; the appellants' total tax liability, that is, was unaffected. We think the question is covered, however, by the holding of *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S. 522 (1959). In addition, appellants are affected by the requirements that they file a New Hampshire tax return and that their employers withhold 4% of their earnings; since the appellees do not suggest that appellants are subject to the tax at the 4% rate, at the very least the withholding requirement deprives them of the use value of the excess withheld over their ultimate tax liability, if any. These effects may not be substantial, but they establish appellants' status as parties "adversely affected" by the State's tax laws, giving them "a direct

II

The Privileges and Immunities Clause of Art. IV, § 2, cl. 1, provides: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The clause thus establishes a norm of comity without specifying the particular subjects as to which citizens of one State coming within the jurisdiction of another are guaranteed equality of treatment. The origins of the clause do reveal, however, the concerns of central import to the Framers. During the preconstitutional period, the practice of some States denying to outlanders the treatment that its citizens demanded for themselves was widespread. The fourth of the Articles of Confederation was intended to arrest this centrifugal tendency with some particularity. It provided:

> "that the better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several states; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively."

The discrimination at which this clause was aimed were by no means eradicated during the short life of the Confederation,[5] and the provision was carried over into the

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stake in the outcome" of this litigation. *Sierra Club* v. *Morton*, 405 U. S. 727, 740 (1972).

[5] James Madison, in commentary on the plan of union proposed by William Paterson of New Jersey, wrote: "Will it prevent trespasses of the States on each other? Of these enough has already

comity article of the Constitution in briefer form but with no change of substance or intent,[6] unless it was to strengthen the force of the clause in fashioning a single nation.[7] Thus, in the first and long the leading explication of the clause, Mr. Justice Washington, sitting as Circuit Justice, deemed the fundamental privileges and immunities protected by the clause to be essentially coextensive with those calculated to achieve the purpose of forming a more perfect Union, including "an exemption from higher taxes or impositions than are paid by the other citizens of the state." *Corfield* v. *Coryell*, 6 F. Cas. 546, 552 (No. 3,230) CCED Pa. 1825.

In resolving constitutional challenges to state tax measures this Court has made it clear that "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Madden* v. *Kentucky*, 309 U. S. 83, 88 (1940). See *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U. S. 356 (1973). Our review of tax classifications has generally been concomitantly narrow, therefore, to fit the broad discretion vested in

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been seen. He instanced Acts of Virga. & Maryland which give a preference to their own citizens in cases where Citizens [of other states] are entitled to equality of privileges by the Articles of Confederation." 1 M. Farrand, Records of the Federal Convention 317 (1911).

[6] Charles Pinckney, who drafted the shorter version now found in Art. IV, § 2, cl. 1, see 37 Annals of Cong., 1129 (1821), assured the Convention that "[t]he 4th article, respecting the extending the rights of the Citizens of each State throughout the United States [etc.] is formed exactly upon the principles of the 4th article of the present Confederation. . . ." 3 M. Farrand, *supra*, at 112. For an explanation of the deletion of certain phrases found in Art. IV of the Confederation in light of the Fugitive Slave and Commerce Clauses of the Constitution, see *Lemmon* v. *The People*, 20 N. Y. 562, 627 (1860) (Opinion of Wright, J.).

[7] *Lemmon* v. *The People*, 20 N. Y. 562, 607 (1860) (Denio, J.); see *Paul* v. *Virginia*, 75 U. S. (8 Wall.) 168, 180 (1868).

the state legislatures. When a tax measure is challenged as an undue burden on an activity granted special constitutional recognition, however, the appropriate degree of inquiry is that necessary to protect the competing constitutional value from erosion. See *Lehnhausen* v. *Lake Shore Auto Parts Co., supra,* 410 U. S., at 359.

This consideration applies equally to the protection of individual liberties, see *Grosjean* v. *American Press Co.,* 297 U. S. 233 (1936), and to the maintenance of our constitutional federalism. See *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U. S. 157, 164 (1954). The Privileges and Immunities Clause, by making noncitizenship or nonresidence [8] an improper basis for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism. Since nonresidents are not represented in the taxing State's legislative halls, cf. *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U. S. 522, 532–533 (1959) (BRENNAN, J., concurring), judicial acquiescence in taxation schemes that burden them particularly would remit them to such redress as they could secure through their own State; but "to prevent [retaliation] was one of the chief ends sought to be accomplished by the adoption of the Constitution." *Travis* v. *Yale & Towne Mfg. Co.,* 252 U. S. 60, 80 (1920). Our prior cases, therefore, reflect an appropriately heightened concern for the integrity of the Privileges and

[8] For purposes of analyzing a taxing scheme under the Privileges and Immunities Clause the terms "citizen" and "resident" are essentially interchangeable. *Travis* v. *Yale & Towne Mfg. Co.,* 252 U. S. 60, 78–79 (1920) ("a general taxing scheme . . . if it discriminates against all non-residents, has the necessary effect of including in the discrimination those who are citizens of other States"); *Smith* v. *Loughman,* 245 N. Y. 486, 492, 157 N. E. 753, 755, cert. denied, 275 U. S. 560 (1927); see *Toomer* v. *Witsell,* 334 U. S. 385, 397 (1948).

Immunities Clause by erecting a standard of review substantially more rigorous than that applied to state tax distinctions among, say, forms of business organizations or different trades and professions.

The first such case was *Ward* v. *Maryland*, 79 U. S. (12 Wall.) 418 (1870), challenging a statute under which nonresidents were required to pay $300 per year for a license to trade in goods not manufactured in Maryland, while resident traders paid a fee varying from $15 to $150, depending upon the value of their inventory. The State attempted to justify this disparity as a response to the practice of "runners" from industrial States selling by sample in Maryland, free from local taxation and other overhead expenses incurred by resident merchants. It portrayed the fee as a "tax upon a particular business or trade, carried on in a particular mode," rather than a discrimination against traders from other States. Although the tax may not have been "palpably arbitrary," see *Allied Stores of Ohio, Inc.* v. *Bowers*, *supra*, 358 U. S., at 530, the discrimination could not be denied and the Court held that it violated the guarantee of the Privileges and Immunities Clause against "being subjected to any higher tax or excise than that exacted by law of . . . permanent residents."[9]

In *Travellers' Insurance Co.* v. *Connecticut*, 185 U. S. 364 (1902), the Court considered a tax laid on the value of stock in local insurance corporations. The shares of nonresident stockholders were assessed at their market value, while those owned by residents were assessed at market value less the proportionate value of all real

[9] Accord, *Toomer* v. *Witsell*, *supra*, 334 U. S., at 396, where the Court held invalid another discrepant licensing fee system, citing *Ward* v. *Maryland* for the proposition that "it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of *substantial equality with the citizens of that State*." (Emphasis added.)

estate held by the corporation and on which it had already paid a local property tax. In analyzing the apparent discrimination thus worked against nonresidents, the Court took account of the overall distribution of the tax burden between resident and nonresident stockholders. Finding that nonresidents paid no local property taxes, while residents paid those taxes at an average rate approximating or exceeding the rate imposed by the State on nonresidents' stock, the Court upheld the scheme. While more precise equality between the two classes could have been obtained, it was "enough that the State has secured a reasonably fair distribution of burdens, and that no intentional discrimination has been made against non-residents." Their contribution to state and local property tax revenues, that is, was no more than the ratable share of their property within the State.

The principles of *Ward* and *Travellers'* were applied to taxes on nonresidents' local incomes in *Shaffer* v. *Carter*, 252 U. S. 37 (1920), and *Travis* v. *Yale & Towne Mfg. Co.*, *supra*. *Shaffer* upheld the Oklahoma tax on income derived from local property and business by a nonresident where the State also taxed the income—from wherever derived—of its own citizens. Putting aside "theoretical distinctions" and looking to "the practical effect and operation" of the scheme, the nonresident was not treated more onerously than the resident in any particular, and in fact was called upon to make no more than his ratable contribution to the support of the state government. The New York tax on residents' and nonresidents' income at issue in *Travis*, by contrast, could not be sustained when its actual effect was considered. The tax there granted personal exemptions to each resident taxpayer for himself and each dependent, but it made no similar provision for nonresidents. The disparity could not be "deemed to be counterbalanced" by an

exemption for nonresidents' interest and dividend income because it was not likely "to benefit nonresidents to a degree corresponding to the discrimination against them." Looking to "the concrete, the particular incidence" of the tax, therefore, the Court said of the many New Jersey and Connecticut residents who worked in New York:

> "They pursue their several occupations side by side with residents of the State of New York—in effect competing with them as to wages, salaries and other terms of employment. Whether they must pay a tax upon the first $1,000 or $2,000 of income, while their associates and competitors who reside in New York do not, makes a substantial difference. . . . This is not a case of occasional or accidental inequality due to circumstances personal to the taxpayer . . . but a general rule, operating to the disadvantage of all non-residents . . . and favoring all residents. . . ." 252 U. S., at 80–81 (citations omitted).

III

Against this background establishing a rule of substantial equality of treatment for the citizens of the taxing State and nonresident taxpayers, the New Hampshire Commuters Income Tax cannot be sustained. The overwhelming fact, as the State concedes, is that the tax falls exclusively on the incomes of nonresidents; and it is not offset even approximately by other taxes imposed upon residents alone.[10] Rather, the argument advanced in fa-

[10] The $10 annual resident tax and the tax on certain unearned income in excess of $600 would rarely equal, much less exceed, the 4% tax on nonresidents' incomes over $2,000. Appellant Logan, for example, with $33,000 of New Hampshire derived income, paid $252 in taxes to that State; a resident with the same earned income would have paid only the $10 resident tax. Against this disparity and the disparities among nonresidents' tax rates depending on their State of residence, we find no support in the record for the assertion

vor of the tax is that the ultimate burden it imposes is "not more onerous in effect," *Shaffer* v. *Carter, supra,* on nonresidents because their total state tax liability is unchanged once the tax credit they receive from their State of residence is taken into account. See n. 4, *supra.* While this argument has an initial appeal, it cannot be squared with the underlying policy of comity to which the Privileges and Immunities Clause commits us.

According to the State's theory of the case, the only practical effect of the tax is to divert to New Hampshire tax revenues that would otherwise be paid to Maine, an effect entirely within Maine's power to terminate by repeal of its credit provision for income tax paid to another State. The Maine Legislature could do this, presumably, by amending the provision so as to deny a credit for taxes paid to New Hampshire while retaining it for the other 49 States. Putting aside the acceptability of such a scheme, and the relevance of any increase in appellants' home state taxes that the diversionary effect is said to have,[11] we do not think the possibility that Maine could shield its residents from New Hampshire's tax cures the constitutional defect of the discrimination in that tax. In fact, it compounds it. For New Hampshire in effect

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of the court below that the Commuter Income Tax creates no more than a "practical equality" between residents and nonresidents when the taxes paid only by residents are taken into account. "[S]omething more is required than bald assertion"—by the state court or by counsel here—to establish the validity of a taxing statute that on its face discriminates against nonresidents. *Mullaney* v. *Anderson,* 342 U. S. 415, 418 (1952).

[11] The States of Maine and Vermont, *amici curiae,* point out that at least $400,000 was diverted from Maine to New Hampshire by reason of the challenged tax and Maine's tax credit in 1971, and that the average Maine taxpayer, appellants included, thereby bore an additional burden of $.40 in Maine taxes. While the inference is strong, we deem the present record insufficient to demonstrate that Maine taxes were actually higher than they otherwise would have been but for this revenue loss.

invites appellants to induce their representatives, if they can, to retaliate against it.

A similar, though much less disruptive, invitation was extended by New York in support of the discriminatory personal exemption at issue in *Travis*. The statute granted the nonresident a credit for taxes paid to his State of residence on New York derived income only if that State granted a substantially similar credit to New York residents subject to its income tax. New York contended that it thus "looked forward to the speedy adoption of an income tax by the adjoining States," which would eliminate the discrimination "by providing similar exemptions similarly conditioned." To this the Court responded in terms fully applicable to the present case; referring to the anticipated legislative response of the neighboring States, it stated:

> "This, however, is wholly speculative; New York has no authority to legislate for adjoining States; and we must pass upon its statute with respect to its effect and operation in the existing situation. . . . A State may not barter away the right, conferred upon its citizens by the Constitution of the United States, to enjoy the privileges and immunities of citizens when they go into other States. Nor can discrimination be cured by retaliation; to prevent this was one of the chief ends sought to be accomplished by the adoption of the Constitution." 252 U. S., at 82.[12]

Nor, we may add, can the constitutionality of one State's statutes affecting nonresidents depend upon the present configuration of the statutes of another State.

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[12] Neither *Travis* nor the present case should be taken in any way to denigrate the value of reciprocity in such matters. The evil at which they are aimed is the unilateral imposition of a disadvantage upon nonresidents, not reciprocally favorable treatment of nonresidents by States that coordinate their tax laws.

Since we dispose of this case under Art. IV, § 2, of the Constitution, we have no occasion to address the equal protection arguments directed at the disparate treatment of residents and nonresidents and at that feature of the statute that causes the rate of taxation imposed upon nonresidents to vary among them depending upon the rate established by their State of residence.

Reversed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 73-2060

Carl M. Austin et al., Appellants, *v.* State of New Hampshire et al.	On Appeal from the Supreme Court of New Hampshire.

[March 19, 1975]

MR. JUSTICE BLACKMUN, dissenting.

For me, this is a noncase. I would dismiss the appeal for want of a substantial federal question. We have far more urgent demands upon our limited time than this kind of litigation.

Because the New Hampshire income tax statutes operate in such a way that no New Hampshire resident is ultimately subjected to the State's income tax, the case at first glance appears to have some attraction. That attraction, however, is superficial and, upon careful analysis, promptly fades and disappears entirely. The reason these appellants, who are residents of Maine, not of New Hampshire, pay a New Hampshire tax is because the Maine Legislature—the appellants' own duly elected representatives—has given New Hampshire the option to divert this increment of tax (on a Maine resident's income earned in New Hampshire) from Maine to New Hampshire, and New Hampshire willingly has picked up that option. All that New Hampshire has done is what Maine specifically permits and, indeed, invites it to do. If Maine should become disenchanted with its bestowed bounty, its legislature may change the Maine statute. The crux is the statute of Maine, not the statute of New Hampshire. The appellants, therefore, are really com-

plaining about their own statute. It is ironic that the State of Maine, which allows the credit, has made an appearance in this case as an *amicus* urging, in effect, the denial of the credit by an adjudication of unconstitutionality of New Hampshire's statute. It seems to me that Maine should be here seeking to uphold its own legislatively devised plan or turn its attention to its own legislature.

All this is reminiscent of the Federal Estate Tax credit for state death taxes paid, originally granted by § 301 (b) of the Revenue Act of 1924, 43 Stat. 304, and by § 301 (b) of the Revenue Act of 1926, 44 Stat. 70, and now constituting § 2011 of the Internal Revenue Code of 1954, 26 U.S.C. § 2011. States, including New Hampshire and those adjacent to it, through specific legislation, have taken advantage of the credit allowed. 16 Maine R. S. A. c. 563 (1965); 8A Mass. G. L. A. c. 65A (1969); 1–A N. H. R. S. A. c. 87 (1970 Repl.); 8A Vt. S. A. c. 183 (1970 Repl.). The credit provision has been upheld against constitutional attack. *Florida* v. *Mellon*, 273 U. S. 12, 17 (1927); *Rouse, Executor* v. *United States*, 65 Ct. Cl. 749, cert. denied, 278 U. S. 638 (1928).

One wonders whether this is just a lawyers' lawsuit. Certainly, the appellants, upon prevailing today, have no direct or apparent financial gain. Relief for them from the New Hampshire income tax results only in a corresponding, *pro tanto*, increase in their Maine income tax. Dollarwise, they emerge at exactly the same point. The single difference is that their State, Maine, enjoys the tax on the New Hampshire-earned income, rather than New Hampshire. Where, then, is the injury? If there is an element of injury, it is Maine-imposed.

We waste our time, therefore, by theorizing and agonizing about the Privileges and Immunities Clause and equal protection in this case. But if that exercise in

futility is nevertheless indicated, I see little merit in the appellants' quest for relief. It is settled that absolute equality is not a requisite under the Privileges and Immunities Clause. *Toomer* v. *Witsell*, 334 U. S. 385, 396, 408 (1948). And I fail to perceive unconstitutional unequal protection on New Hampshire's part. If inequality exists, it is due to differences in the respective income tax rates of the States that border upon New Hampshire.

I say again that this is a nonease, made seemingly attractive by high-sounding suggestions of inequality and unfairness. The State of Maine has the cure within its grasp, and if the cure is of importance to it and to its citizens, such as appellants, it and they should be about adjusting Maine's house rather than coming here complaining of a collateral effect of its own statute.